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TRANSCRIPT OF RECORD.

619

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~350.~~ 72

JAMES B. WHITE, PLAINTIFF IN ERROR,

vs.

GEORGE M. BARBER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 8, 1884.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Tuesday, the twenty-seventh day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and eighth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

JAMES B. WHITE *vs.* GEORGE M. BARBER.

Assumpsit.

Be it remembered that on the twenty-eighth day of June, A. D. 1883, there was filed in the office of the clerk of said court a bond for costs and a transcript of the record from the superior court of Cook county, Illinois, in said above-entitled cause; which said bond and transcript are, respectively, in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

Circuit Court. July Term, A. D. 1883.

JAMES E. WHITE *vs.* GEORGE M. BARBER.

In assumpsit. Removal from superior court of Cook county.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the defendant of any costs ordered or adjudged to be paid by him we hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 28th day of June, A. D. 1883.

DENT & BLACK.

Endorsed: Filed June 28, A. D. 1883. Wm. H. Bradley, clerk.

Transcript.

UNITED STATES OF AMERICA, } *ss:*
State of Illinois, County of Cook, }

Pleas before the Honorable Rollin S. Williamson, one of the judges of the superior court of Cook county, in the State of Illinois,
3 holding a branch court of said court at a regular term of said superior court of Cook county begun and holden at the court-house in the city of Chicago, in said county and State,

on the first Monday, being the fourth day, of June, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the hundred and seventh.

Present: The Honorable Rollin S. Williamson, judge of the superior court of Cook county; Luther Laflin Mills, state's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the tenth day of May, in the year of our Lord one thousand eight hundred and eighty-three, the plaintiff, by his attorneys, filed in the office of the clerk of the superior court of Cook county his certain *præcipe* for summons, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss:*
County of Cook, }

Superior Court of Cook County, of the May Term, A. D. 1883.

JAMES B. WHITE, Plaintiff, *vs.* GEORGE M. BARBER, Defendant.

Assumpsit. Damages, $15,000.

The clerk of said court will issue a summons in the above-
4 entitled cause to said defendant in a plea of trespass on the case upon promises, to the damage of said plaintiff in the sum of fifteen thousand dollars; direct the same to the sheriff of Cook county to execute, and make it returnable to the June term of said court, A. D. 1883.

Chicago, May 10, 1883.

STILES AND LEWIS,
Plaintiff's Attorney.

To John J. Healy, Esq., clerk.

And on the day and year last aforesaid, to wit, May 10, A. D. 1883, there issued out of the office of the clerk of said court the people's writ of summons; which writ, with the return of the sheriff thereon endorsed, is in words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon George M. Barber, if he shall be found in your county, personally to be and to appear before the superior court of Cook county, on the first day of the term thereof, to be holden at the court-house in the city of Chicago, in said Cook county, on the first Monday of June next, to answer unto James B. White in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of fifteen thousand dollars.

5 And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healey, clerk of our said court, and the seal thereof at Chicago aforesaid, this 10th day of May, A. D. 1883.

[SEAL.] JNO. J. HEALY, *Clerk.*

Served this writ on the within-named George M. Barber by reading this writ to him this 12th day of May, 1883.

SETH F. HANCHETT, *Sheriff,*
By J. H. BURKE, *Deputy.*

And afterwards, to wit, on the 18th day of May, in the year last aforesaid, to wit, A. D. 1883, there was filed in the office of the clerk of said county a certain declaration, which is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, of the May Term, A. D. 1883.

James B. White, plaintiff in this suit, by Stiles and Lewis, his attorneys, complain- of George M. Barber, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises—

For that whereas the said defendant heretofore, to wit, on the 1st day of May, in the year of our Lord one thousand eight hundred and eighty-three, at Chicago, to wit, at the county aforesaid, became and was indebted to the said plaintiff in the sum of fifteen thousand

6 dollars of lawful money of the United States of America for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant and at the special instance and request of the said defendant, and being so indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterward requested; and

Whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time at the like special instance and request of the said defendant sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of

fifteen thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid whereof the said defendant afterwards on the same day and year and at the place aforesaid had notice; and

7 Whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiff in the further sum of fifteen thousand dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant, and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff, and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant;

And being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this court mentioned when the said defendant should be thereunto afterwards requested; and

8 Whereas also the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of fifteen thousand dollars of like lawful money as aforesaid;

And being so found in arrear and indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested:

Nevertheless, the said defendant (although often requested, etc.) has not yet paid the said several sums of money above mentioned, or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of fifteen thousand dollars; and therefore the said plaintiff brings suit, etc.

STILES AND LEWIS,
Plaintiff's Attorneys.

9 *Copy of Account Sued on.*

George M. Barber to James B. White, Dr.

To goods, wares, and merchandise sold and delivered	$15,000
To money lent and advanced	15,000
To money paid, laid out, and expended	15,000
To money had and received to and for the use of said plaintiff	15,000
To money due for interest and forbearance	15,000
To labor, services, and material	15,000
To balance due on account stated	15,000

Afterwards, to wit, on the 6th day of June, in the year last aforesaid, to wit, A. D. 1883, there was filed in the office of said clerk a certain plea, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss.:
Cook County, }

In the Superior Court of Cook County, of the June Term, 1883.

GEORGE M. BARBER *ats.* JAMES B. WHITE.

Assumpsit.

And now comes the said defendant, by Dent and Black, his attorneys, and defends the wrong and injury when, etc., and says that he did not undertake and promise in the manner and form as the plaintiff has in his declaration thereof complained against
10 him, and of this he puts himself upon the country.

DENT AND BLACK,
Defendant's Attorney.

And afterwards, to wit, on the 20th day of June, in the — last aforesaid, to wit, A. D. 1883, there was filed in the office of said clerk a certain petition and bond for removal of cause to the U. S. circuit — of the United States, which are in words and figures as follows, to wit:

Petition for Removal to the Circuit Court of the United States for the Northern District of Illinois.

In the Superior Court of Cook County, State of Illinois.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

To the said superior court of cook county:

Your petitioner, George M. Barber, the defendant in the above-entitled cause, respectfully shows to this honorable court that the matter in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars ($500), and that the petitioner was, at the time of the commencement of the said suit and still is, a citizen of the State of Illinois and resident of the said

northern district of Illinois, and that said James B. White, the plaintiff, was; at the time of the commencement of the said suit and still is, a citizen of the State of Indiana; and your petitioner
11 further shows that the present term of the said superior court of Cook county is the term at which said cause could be first tried, and that this petition is presented before the trial thereof; and your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and for paying all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed to said circuit court of the United States in and for the northern district of Illinois; and your petitioner will ever pray, etc.

GEORGE M. BARBER,
By DENT AND BLACK,
His Att'ys.

STATE OF ILLINOIS, }
Cook County, } *ss:*

George M. Barber, being duly sworn, says that he has read the foregoing petition and knows the contents thereof; and he further says that the statements and allegations therein contained are true.

GEORGE M. BARBER.

Subscribed and sworn to before me this sixteenth day of June, A. D. 1883.

[NOTARIAL SEAL.] EBEN HALE WELLS,
Notary Public.

12 Know all men by these presents that we, George M. Barber, as principal, and William M. Gregg, as surety, are held and firmly bound unto James B. White in the penal sum of five hundred dollars ($500); for the payment whereof, well and truly to be made unto the said James B. White, his heirs, executors, or administrators, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Witness our hands and seals this — day of June, A. D. 1883.

Whereas the said George M. Barber has petitioned the superior court of Cook county, in the State of Illinois, for the removal of a certain cause therein pending, wherein said James B. White is plaintiff and said George M. Barber is defendant, to the circuit court of the United States in and for the northern district of Illinois:

Now the condition of the foregoing obligation is such that if the said George M. Barber shall enter in the said circuit court of the United States, on the first day of the next session thereof, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said

court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, but otherwise the same shall remain in full force.

GEORGE M. BARBER. [SEAL.]
WILLIAM M. GREGG. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

William M. Gregg, being first duly sworn, on oath says that
13 he is worth the sum of one thousand dollars ($1,000.00) over and above all his just debts and liabilities and legal exemptions.

WM. M. GREGG.

Subscribed and sworn to before me this 16th day of June, A. D. 1883.

[NOTARY SEAL.] EBEN HALE WELLS,
Notary Public.

On the day and year last aforesaid, to wit, June 20th, A. D. 1883, the same being one of the days of the June term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

JAMES B. WHITE
vs. } 86864.
GEORGE M. BARBER.

Assumpsit.

On motion of defendant's attorney, on filing petition and bond, it is ordered that said cause be, and is hereby, transferred to the United States circuit court in and for the northern district of Illinois, and that the clerk of this court do forthwith transmit to said United States circuit court a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record herein.

14 STATE OF ILLINOIS, } ss:
County of Cook, }

I, John J. Healy, clerk of the superior court of Cook county in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court on the common law side thereof, wherein James B. White was plaintiff and George M. Barber defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 27th day of June, A. D. 1883.

[SEAL.] JNO. J. HEALY, *Clerk.*

Endorsed: Filed June 28, 1883. Wm. H. Bradley, clerk.

Afterwards, to wit, on the fourth day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

Assumpsit.

Now come the parties, by their attorneys, and upon issue
15 joined herein thereupon come a jury of good and lawful men, to wit, Thomas A. Doxey, John Ross, William Friese, Morell Fuller, William Dodds, Frederick H. Rohmeyer, William H. Johnson, Henry J. Traver, John Downing, C. C. Wilcox, A. S. Barnard, and C. G. Pettibone, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the fifth day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

16 Afterwards, to wit, on the sixth day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

Assumpsit.

Now come again the parties, by their counsel, and now comes also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of the counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties, by their attorneys, the jury, when they

shall have agreed upon a verdict, may sign and seal the same and deliver it to the officer in charge and disperse, and the parties, by their attorneys, also waive in open court their right to poll the jury or to have them present when the verdict is opened.

Afterwards, to wit, on the seventh day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

Assumpsit.

17 Now come again the parties, by their respective attorneys, and the jury in this behalf empaneled and sworn this day, through the said officer in charge, — their sealed verdict, which, being opened and read by the clerk in open court, is as follows: We, the jury, find the issues joined for the defendant; and thereupon the plaintiff, by his attorney, moves the court for a new trial herein.

18 Afterwards, to wit, on the twenty-seventh day of May, in the adjourned May term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

Assumpsit.

The court, having considered and being now fully advised, upon the motion of the plaintiff heretofore entered herein for a new trial of this cause, overrules the same and awards judgment.

It is thereupon considered and adjudged by the court that the defendant do have and recover of the plaintiff his costs about his defense in this behalf expended, amounting to — dollars and — cents, and that he have execution therefor.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

19 *Bill of Exception.*

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

Be it remembered that on the trial of the above-entitled cause, before the Hon. Henry W. Blodgett, judge of the district court in and for said district and sitting as judge of said circuit court, and a

jury duly empanneled and sworn herein, the plaintiff, to maintain the issues on his part, introduced the following evidence—that is to say:

James B. White, the plaintiff, who, being first duly sworn, testified that now and during the time in question he resided at Ft. Wayne, Indiana, engaged in the business of dealing in general merchandise; that in 1879 and prior thereto one A. S. Maltman, of Chicago, acted as his agent in purchasing and forwarding merchandise of various kinds; that about September, 1879, desiring to do some trading on the board of trade, Chicago, I asked Maltman to recommend some good responsible broker on the
20 board of trade through whom I could do business; that Waltman recommended the defendant, who then and during the time in question was a broker residing in Chicago and doing business on the board of trade; that thereupon I commenced trading on the board, sending my orders at first to Maltman, who communicated them to the defendant; that about December, 1879, I came to Chicago, made the acquaintance of defendant, and thereafter did business directly with him; that I continued to do business with defendant during the years 1879, 1880, 1881, and 1882, buying and selling on the board, through the defendant as broker, corn, wheat, oats, pork, and other commodities, and that about April 19th, 1882, I had a settlement with defendant, in which all previous dealings were adjusted; that up to this time the transactions which I had made through defendant on the board amounted to $105,000 in 1879; $1,718,000 in 1880; $640,000 in 1881, and $672,000 in 1882; that in November or December, 1879, and at other times prior to the settlement in April, 1882, I had conversations with the defendant in which I told defendant that I was a merchant in Fort Wayne, and did not want it known that I was
21 engaged in speculating on the board of trade in Chicago, as it might affect my credit, and that the account could be kept in the name of A. S. Maltman; that I considered it a hazardous business, but was willing to gamble provided I could have a fair show; that I wanted my deals placed with responsible parties, so that I could get my money when I made it; that I didn't want any of the property, but me-nt simply to do a gambling business; that defendant told me (plaintiff) that he knew what I wanted; that Maltman had explained my situation and business; that he would deal only with responsible parties, and the deals should be settled so as to get the profits or losses; that defendant told me (plaintiff) that not one bushel in a million that was bought and sold on the board was legitimate business; that a few of the large houses did some legitimate business, but most of it was simply trading in differences; that he (defendant) did nothing but business of the latter kind; that he dealt mostly for himself; that he did a good deal of "scalping," deals made and closed the same day on the turn of the market; that he did not let his deals run over night; that up to April, 1882, I (plaintiff) never delivered or received any of the property
22 so sold or bought, nor was anything ever said by defendant to me about receiving or delivering the property or making

arrangements to do so; that from time to time defendant rendered statements to me (plaintiff) showing the deals made, the price per bushel, or, in case of pork, the price per 100 lbs., at which the commodity was bought and sold, the difference in dollars and cents, the commissions charged, and the total debit or credit passed to my account; that all the deals made were in form contracts for future delivery, in which the seller had the option of delivering at any time during some future month; that up to April, 1882, all trades made by defendant for me (plaintiff) had been settled or closed by counter-trades prior to the month in which delivery could be made; up to April 19, 1882, no commodities had been delivered to or received on these trades, nor had any suggestion or requirement on the part of Mr. Barber to deliver been made; that defendant never reported to me the names of the parties with whom trades were made on my account, and that I never knew or inquired who such parties were;

23 that after the settlement in April I commenced selling wheat for July delivery, and by the last of May had sold through defendant 100,000 bushels for that delivery, which are the trades in question in this case; that there was a corner in July wheat and the price was forced up ten or twelve cents; that on the last of July I came to Chicago, had an interview with defendant in the morning, in which he (defendant) proposed to make a tender of No. 2 red winter wheat, the kind sold being No. 2 spring wheat; that No. 2 red winter is intrinsically more valuable than No. 2 spring, but that on the last of July the former stood at 98 cents per bushel and the latter of $1.35 to $1.37; that I (plaintiff) knew of the tender, & I did not object; that I met defendant later in the day, and was informed by him that he had borrowed warehouse receipts for ten thousand bushels No. 2 red winter wheat and had made a tender of the same to the several parties to whom he had the wheat sold, and that such tender was in every case declined, and that said tender was made under the following rules of the board of trade, viz: "On contracts for grain for future delivery the tender of the higher

24 grade of the same kind of grain as the one contracted for shall be deemed sufficient, provided the higher grade of grain tendered shall not be of a color or quantity that will depreciate the value of the other if mixed."

Prior to December, 1879, I bought, through defendant, 100,000 bushels of corn for December delivery. I came to Chicago and defendant told me the deal had gone against me $4,500, and he said I had to close it that day. The loss was that amount, and I paid it that day. No corn was delivered on either side. In January, 1880, I sold, through Barber, 20,000 bushels of wheat. My profit was $400. I did not take the profit, but sold more, and the deal went against me $2,000, and I paid it up.

I then commenced buying, and made $600 on March wheat bought in January. I commenced selling wheat in March, 1880, and made a good deal of money for a few months; recovered losses in April and commenced selling May wheat. The May options took a sudden start up, and I lost $8,000, and I paid it. It was expressly stated by me to Barber that I wanted no property. He knew that. He

said, "Certainly, I know that," and that the deals should be
25 settled on the margins—on the profits. Up to April, 1882, nothing had been delivered by me or received by me, nor had there been any suggestion or requirement on defendant's part to deliver made; on the other hand, it was never expected to handle the property, but merely to trade in the different deals. Up to the close of the July deal, 1882, no demand had been made on me by Barber for the delivery of wheat or corn, or any other commodity.

That I received the following statement of account from defendant about the day of its date (which was read in evidence):

"CHICAGO, *Oct. 30th*, '82.

A. S. Maltman (J. B. W.) in acc't with G. M. Barber, Cr.

1882.			
July	1.	By balance	12,000 00
	3.	" draft	3,000 00
Sept.	11.	" profit as per statement rend.	931 25
	12.	" " " " " "	2,018 75
	27.	" " " " " "	318 75
Octo.	26.	" " " " " "	300 00

DEBIT.

July	31.	To loss as per statement rend.	2,668 75	
Aug.	11.	" " " " " "	100 00	
Sept.	12.	" draft	3,000 00	
Octo.	27.	" loss as per statement rend.	400 00	
	30.	" draft	987 50	
		To balance	11,412 50	
			$18,568 75	$18,568 57

26 Octo. 30. By balance, being diff. between price-- 11,412 50

I have 100 M July spring wh't sold for you and the settling price of same as fixed by board of trade (1.35), including coms., ¼c.

That the item of $12,000 balance in said account consisted of money advanced and paid to the defendant; that the item "July 3rd, by draft $3,000," consisted of $3,000 money paid the defendant by means of a draft. Plaintiff testified further that on April 2nd, 1883, I served the following notice upon the defendant by delivering to him a copy thereof; the defendant read the notice, admitted he had the money in his hands, but declined to pay it over.

The notice was offered in evidence, and is as follows:

"To G. M. Barber, Esq:

"In a statement made by you, dated October 30th, 1882, of deals made on my account on the board of trade, Chicago, you acknowledge a balance in your hands of $11,412.50 in my favor, being, so the statement says, the difference between price you sold 100 M in July spring wheat for me and the selling price of same as fixed by

the board of trade, $1.35, including your commission of ¼ cent;
27 now you are hereby notified that I claim all contracts for sale of said wheat to be illegal and void, and forbid you to pay over any part of said money or balance to any one, and I further demand the immediate payment thereof to myself.

"Dated Chicago, April 2nd, 1883.

"JAMES B. WHITE."

On cross-examination plaintiff testified that during all the time he traded through defendant Maltman continued to some extent to act as his agent in the business with defendant; that he received some profits debited to him in the statement offered in evidence; that defendant complied with his orders so far as he knows; that he didn't think defendant had anything to do with the corner in wheat; that he (plaintiff) had nothing to do with the appointment of a committee by the board to fix a selling price for July wheat; that he knew what was going on and talked with A. M. Wright and other members of the board of trade about the deal, but did not enter into any agreement or arrangement with the other brokers similarly situated to the defendant in regard to legal proceedings to prevent the consummation of the corner; did not employ counsel on
28 behalf of defendant or authorize any steps to be taken in his name; that he (plaintiff) was an outsider and was not recognized in that matter; that he did not agree to pay attorney's fees, but expected he would have to do so, and did after the litigation was over; that he knew a bill was filed; that the matter was contested and decided by the supreme court in favor of the cornerers. The litigation was after a committee appointed by the board had fixed the selling price at $1.35.

In the progress of the case the plaintiff testified further, among other things:

I left it for Mr. Barber to put the contracts in form when I wished him to buy or sell. I understood that he would go on the board of trade and either buy or sell, and I understood that he did go on the board of trade and buy and sell according to my orders. There was no disobedience of my orders, so far as I know. I have no complaint to make on the score of non-observance of my orders. I knew that while we thought the corner in July wheat was about to
29 culminate buying wheat at Milwaukee or elsewhere to fill orders was talked about—a great many talked of it—but it was considered that parties who attempted that got beaten, because they simply dropped the grade on them. It is possible I may have talked with Maltman about the possibility of buying wheat in Milwaukee to fill my orders, but I never dreamed of it. I said some were doing it; some did do it. It was generally talked that some people had done it, and, as to the propriety of doing it, it was only three cents, I think, to bring it from Milwaukee here, and twelve, fifteen, or twenty cents, somewhere along there, lower a bushel, and they could fill their contracts here with it and not lose so much as they would in the extortion of the corner. I might have said, "Well, it could be done," "I wish I could do it," or some-

thing of that kind. I knew *if* Barber, being a member of the board of trade and making contracts on the board for me, would be obliged to observe the rules of the board. I understood there was a rule that one must keep his margin good. I told him to buy and told him to sell and told him to sell out and when to cover
30 and when to close trades, and he observed my orders. If there was any corner it was not my fault, as I was selling, and it was not from Barber's fault, so far as I know. After he made the tender of red winter wheat on the 31st of July, 1882, I approved of what he did. I went to see Mr. A. M. Wright, who was one of the parties proposing to file a bill to question the propriety or binding force of a finding of a committee of the board of trade fixing the settling price for July wheat. I saw published a communication in the paper, an interview with the reporter, in regard to this corner, or at least he published a communication and I went to see him and consulted with him about it.

The complaint was that the price of July wheat was put too high on the 31st of July. Barber had spoken about the contracts being under the board of trade rules.

After the culmination of the corner I got a copy of the rules—printed copy. He showed in the rules under which the committee was appointed. I think the rule is on page 51 of Rules of 1882, sec. 3. Mr. Wright believed it was a legal tender; so did I.

31 I believed that "red" would be a good tender. I went to see counsel; it was John E. Burke. He was a lawyer who had charge of what he called contested cases. There were some thirty-two members of the board in contested cases, and Mr. Barber joined in with them. I footed the lawyer's bill; that was all I did. I told Mr. Burke that I was one of the fellows that got bled in this affair, and I did not want to stand it if he could help it. He was seemingly as much out of humor about it as I was, as far as the situation was concerned—the unfairness of it. When it came to pay for the expense of those legal proceedings the bills were presented to Mr. Barber and Mr. Maltman, and I told them to pay them, and I would pay them back; and I did. I went with Mr. Wright to Mr. Burke. Mr. Barber was away from home at the time. I told Mr. Burke the situation I was in, and he said: "Well, when your broker comes here have him come up and see me." It was understood that Mr. Barber was my broker or commission merchant, and when he returned he went and joined in with the others
32 to contest this thing. I knew how the matter progressed after that. It was contested in the courts in some formal way to get into the supreme court. There was a *pro forma* decision in the court here, and the case was taken to the supreme court and was there determined in favor of the cornerers. That was after the committee of the board of trade appointed under these rules had been appointed. The case went to the supreme court. We simply had to have patience to wait until they determined it. They determined it about a year ago last January—that is, in January, 1883—before I had served notice on him. In most cases where I bought or sold I closed before the end of the month in some way—either

sold out or covered it. If I bought wheat of a man for the month of July he had the whole month of July in which to tender to me. During the whole of the month of July I had an option at what time I would deliver. The buyer has to close his trade the first of the month, and the seller has to the last of the month, or, if he pleases, he can close between times.

33 George M. Barber, defendant, who, being first duly sworn, testifies as follows: That after the notice was served upon him by plaintiff in April, 1883, he paid over to the various parties to whom he had owed the wheat in question the sum of $11,412.50 less the amount of his commissions, which were $250, and, on cross-examination, that he made such payment because charges had been preferred against him, and he had to pay or be suspended from the board.

Plaintiff here rested his case, and the defendant, to maintain the issues on his part, introduced the following:

George M. Barber, defendant, who, being recalled, testified that he was a commission merchant and member of the board of trade; that he was employed by Maltman to trade for plaintiff on the board of trade—to make trades there; that in executing the orders of plaintiff he dealt with other members of the board; that he did not seek commission business, but dealt mostly on his own account; that once when White was hanging on to a deal which had gone against him witness told him that witness never hung on to a deal,
34 but in his own trades generally calculated when he went home at night to have an equal amount bought and sold so that he would not be affected by the fluctuations of the market, but did not say to Mr. White that White's business would be conducted in that way. Witness had to be governed by White's orders, which were to do so and so; did not recollect plaintiff saying that he wanted to gamble on the board; that the manner of making trades on the board is as follows: If the order was to sell he would go on the board and offer to sell so much wheat at such a price and some other broker would accept the offer, or some other broker might offer to buy and he (defendant) would accept the offer, and thereupon both parties made a memorandum of the trade on a card without comparison; that such memorandum was usually as follows (referring to a card), this being one of the trades in question: "10 M, July, H. G. Gaylord, 1.25⅛, J. B. W.;" that this was the only writing made in the hurry of business on the board; that "10 M" meant 10,000 bushels; "July" meant for delivery in July at the seller's option; that No. 2 spring wheat was understood; that "H. G. Gaylord" was the name of the broker to whom the sale was made;
35 that "1.25⅛" denoted the price, and the initials "J. B. W." indicated that the sale was on account of plaintiff; that their trades were afterwards *in* the same day entered on the books of the respective parties and their clerks went round and compared and checked them off; that this was the case with the sales of 100,000 bushels for delivery at seller's option during July, 1882 (the deals

under consideration); that he had no different agreement with any of the persons with whom he dealt for plaintiff; that the grain was to be delivered or received; that "puts" and "calls" or mere options to buy or sell were not recognized on the board; that it is customary where a com-odity is sold to and bought of the same broker upon different orders for the brokers to settle their trades by paying the difference as the case may be. (And a rule of the board of trade allowing such transfers was read in evidence.) That he never told plaintiff that trading on the board was illegitimate, but may have told him many other of the trades were settled up or offset without delivery.

The volume of transactions was too large to make delivery practicable in all cases. As to the conversation between witness
36 and White, November 30, 1879, witness stated he believed it was the first time he met White, for whom there were then to mature contracts to buy 100,000 bushels corn, and witness told White that the chances were strong that the corn would be delivered, and he must either furnish the money to pay for or order him to sell it, so that he would have a place to put it when delivered or could make arrangements to transfer it; that in the contracts for Mr. White witness had received and delivered property; had received as high as 50,000 bushels in a day; that at the request of plaintiff he did not settle the deals for July, but made default as to the 100,000 bushels. Mr. Maltman, for Mr. White, gave me the draft of $5,000 June 12, 1882. I was required to give my word that I would not buy in the wheat unless by his orders, but would allow him to default, and Maltman told me that White said he would settle—let the committee fix the price and he would settle that way, if possible, if he did not decide to buy in the wheat. White sent witness a telegram from Ft. Wayne, Aug. 5th, 1882, as follows: "Don't cancel the July trades. My attorneys here believe the tender we made is good and can be enforced. J. B. White." (Telegram read
37 in evidence.) There were about thirty other brokers who made default; that a committee was appointed in accordance with the rules of the board, who fixed the settling price at $1.35; that thereupon the brokers filed bills in court to enjoin the board from suspending them for not settling at the price fixed by the committee; that he returned to the city about September 10th, 1882, after being absent a month or more, and was informed by Maltman that the plaintiff had made arrangements for him to join in the injunction proceedings; that the next day he went to the office of J. E. Burke, the attorney for the defaulting brokers, and signed and swore to a bill for the purpose above stated; that said bill was filed; that afterwards the supreme court rendered a decision adverse to the prayer of the bill and the bill was dismissed; that plaintiff was informed of the result, and paid the attorney's fees and damages in the case; that plaintiff did not suggest the making of any further contest; that at the time plaintiff made the demand upon him, April 2nd, 1883, the money in question was under his control,
38 except $6,700, which had been deposited in the bank as margins on account of some of the deals; that he frequently

received and delivered grain; had received as high as 60,000 bushels in a day; that he could not recall any trade in which he bought per Mr. White where he received any commodity, but had no doubt at all in all his tradings he did receive a good deal, but could not recall any particular instance. There was a certainty that it would be delivered, unless after trades; that delivery would be made, unless after the trades were made — I made of-sets. I always do get more or less; do not expect it will all be delivered. I expect I can offset trades with a good part of it. When the 100,000 bushels in question *was* sold, witness expected it would be delivered; that he would buy here in the market, the largest grain market in the world.

Thomas W. Burns, being duly sworn, testified for the defendant that in 1882 he was a member of the firm of Ulrich, Busch & Co. and a broker on the board of trade; that on May 17, 1882, he bought of defendant for his firm "5 July wheat, at 1.24⅜," No. 2 spring wheat (5,000 bushels); that the contract was made in the regular way; that there was no secret understanding or agreement
39 that it was not to be executed, or that it was to be settled; that the wheat was to be delivered at any time in July, at the seller's option.

Abel H. Bliss, being duly sworn, testified for defendant *testified* that he was a member of the board of trade, and was doing business as a commission merchant in 1882; that in May he bought 10,000 bushels July wheat (No. 2 spring, deliverable at seller's option at any time during July) of defendant, which he never received; the wheat was to be delivered in July at the seller's option; that there was no agreement that the wheat was not to be delivered or that it was to be settled; that he certainly expected to get the wheat.

It was admitted that the other brokers to whom defendant had the wheat in question sold would testify in a similar way as to the trades with them, respectively.

Alexander S. Maltman, being sworn, testified for defendant that he was of the firm of A. S. Maltman & Co., and was engaged in the commission business in Chicago; that he acted as agent for plaintiff in his transactions with defendant; that he never told defend-
40 ant that the transactions were to be of a gambling or fictitious character; that his instructions from plaintiff were for the most part contained in telegrams and letters, and these he gave or showed to defendant; that the transactions were quite continuous; that in July, 1882, he had several conversations with plaintiff as to Barber defaulting; that when the price was up in the thirties plaintiff was unwilling to advance more margins unless defendant would agree to default, and that he procured such an agreement from the defendant at the request of plaintiff; that after default had been made plaintiff said he was willing to leave it with the committee to be appointed by the board; that he went with plaintiff to the office of Burke, the attorney; that plaintiff went there to get out an in-

junction to prevent the board of trade from suspending defendant; that he paid out for plaintiff on account of the said — $283.50, which plaintiff had repaid him.

George F. Morcom, who, being duly sworn, testified for defendant that he was of the firm of A. S. Maltman & Co.; that he heard plaintiff say that the tender of No. 2 read winter wheat was good;
41 that, according to their own rules, they were bound to accept it; that plaintiff said that he desired Mr. Barber to default on the deals and let the matter go to a committee & let them fix the price, and said that he would see that Mr. Barber was protected.

Deville C. Bannister, being duly sworn, testified for defendant that during the time in question he was book-keeper for defendant; that plaintiff at the time the injunctions were being obtained went to Mr. Burke's office to see about the matter and said he wished he would take the matter into his own hands; that Mr. Barber did not pay over the money until it was necessary to do so in order to save himself from being suspended from the board.

The bill in chancery above referred to, being a bill filed in the superior court of Cook county by George M. Barber in the interest of or for the benefit of the plaintiff on the 11th of September, 1882, making the Board of Trade of the City of Chicago party defendant, was, together with a copy of the injunction issued in pursu-
42 ance of the writ, read in evidence. It set forth certain sections of the charter of the board of trade, and referred to a copy of the rules of said board in force January 1st, 1882, making such copy a part of the bill as an exhibit, and referred also to sales of number 2 spring wheat made by defendant for delivery in July, 1882, and alleged that there was an unlawful combination to prevent the complainant and others situated like him from fulfilling their contracts, &c., and set forth a certain rule of the board of trade providing, among other things, for the appointment of a committee to determine disputes as to the price of property in case of supposed excessive claims for damages being made under contracts on default, &c., and showed that application for the appointment of such committee was made with reference to the defaults made upon contracts for delivery of No. 2 spring wheat in July, 1882, and showed that the committee determined the price for settlement at $1.35 per bushel, and the decision of the committee was drawn in question by the bill upon various grounds, not drawing in question the validity of the contracts, but questioning whether the board of trade
43 had power to compel members to abide the decision of such committee, and also questioning the regularity of the appointment of the committee, and charging that in the conduct of the hearing had before the committee and in the finding of the committee the spirit of the rules of the board of trade was violated by putting it in the power of persons who had been concerned in cornering the market to get excessive damages, &c. The bill pointed out certain rules of the board of trade under which, in case a member

failed to comply promptly with the terms of any business contract or obligation, or failed to satisfy, adjust, and settle the contract, or failed to comply with or fulfill any award of the committee of arbitration or committee of appeals made in conformity with the rules, regulations, and by-laws of the association, he should, upon admission or proof of the delinquency before the board of directors, be subject to be suspended from all privileges of the association, &c., and an injunction to prevent suspension or expulsion, and especially to restrain and enjoin the board from accepting, treating, or
44 recognizing the decision of the committee aforesaid as in force or as having any effect, as prayed for by the bill. Such injunction was ordered and was issued September 11th, 1882, and was served on the board. There was also introduced a certified transcript of the order of said superior court, made on the 11th of October, 1882, dissolving the injunction and assessing damages on account of the issuing of the same, but showing that by stipulation the cause was to abide the final result of the case of Abner N. Wright *et al. vs.* The Board of Trade of the City of Chicago, in the appellate court or in the supreme court, and that in case of the reversal of the decree in that case, then the decree in the Barber case should be set aside on his motion, and the injunction in his favor was continued. This decree was to be regarded as final in case the decree in the Wright case should be affirmed, except that in such case the injunction was to be dissolved on defendant's motion.

The transcript further showed that on the 16th of April, 1883, the said superior court, in the said chancery suit of Barber, va-
45 cated the order to continue the injunction, and the bill thereupon stood dismissed under the previous order of the court, this being because the supreme court had, in the case of Wright, affirmed the decree of the superior court dismissing his bill.

It appeared that after the decision of the Wright case that inquiry was made of the plaintiff as to whether he wished anything further done in reference to the prosecution of the chancery suit in the name of Barber, and he replied, "Further appearance not necessary."

It further appearing from the testimony that the plaintiff paid the damages which were assessed against Barber on account of the issuing of the injunction, the testimony of the witness Barber tended to show that at the time of the delivery by defendant to the plaintiff of the statement "Exhibit B" aforesaid, dated October 30th, 1882, the balance of $11,412.50 therein mentioned, that amount being the difference between the price at which the one hundred thousand bushels of wheat was sold for July delivery, and $1.35 per bushel, the settling price so fixed by the committee—that is, the
46 difference over and above the commissions of ⅛ of a cent per bushel charged by the defendant—was to remain with the defendant to await the action of the court upon the aforesaid bill in equity, seeking to impeach the decision of the committee fixing the settling price, and that after that matter had been litigated in the courts through the suit so brought in favor of Wright, which was made a test case, complaints were made before the board of directors of the board of trade against the defendant on account of de-

fault on his part in performing or settling the contracts for the sale of the said one hundred thousand bushels of wheat, notice of one or more of which complaints were given by defendant to plaintiff, and the defendant appeared before the directors to make defence, but did not succeed in making any defence, and, being about to be suspended unless he settled, did thereupon settle by paying according to the decision of the committee declaring $1.35 per bushel to be the settling price, so that the moneys paid out by defendant, together with his commissions, exhausted the said sum of $11,412.50,
47 and this was prior to the commencement of this suit; but after the notice of April 2nd, 1883, above set forth, the testimony tended to show that this money was left in defendant's hands by Mr. White, when the aforesaid statement of account stating said balance, &c., was given by defendant to the plaintiff, and was so left for the protection of the defendant, as to the contracts with reference — the litigation arising as to whether the decision of the committee should be allowed to be binding in regard to the settling price.

The foregoing is the substance of the testimony touching the matters upon which the court charged the jury.

And thereupon the court instructed the jury as follows:

48 *Charge to the Jury.*

GENTLEMEN OF THE JURY: This is a suit to recover the sum of $11,412.50, which, as the plaintiff claims, was placed by him in the defendant's hands for the purpose of carrying on certain dealings by the plaintiff on the Chicago Board of Trade with the defendant as his broker, and which dealings the plaintiff claims were illegal, gambling, or wager contracts; and before the defendants had paid over the sum of money in question the plaintiff notified him not to so pay the same, and demanded a return of such money. Hence, the defendant having paid the same in violation of his notice, the plaintiff brings this suit to recover the money from the defendant.

The question of fact for you to determine under the proof is whether these dealings made by the plaintiff on the board of trade through the defendant as his broker were gambling contracts within the meaning of the law. The statute of the State of Illinois upon the subject I will now read you.

Section 130 of chapter 38 reads as follows:

Whoever contracts to have or give to himself or -other the
49 option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to such commodities, shall be fined not less than ten dollars nor more than one thousand dollars or be confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

The plaintiff contends that the contracts in question made by the defendant for him and in his behalf were gambling contracts within the meaning of this law.

The question then arises, What kind of contracts are prohibited by this statute? You will notice the language is, "Whoever contracts to have or give to himself or another the option to sell or buy at a future time"—an option to sell or buy at a future time The courts have construed to some extent the meaning of this
50 statute, and I will read from a case decided by the supreme court of this State the construction which is there given upon it:

The evidence in this record is by no means conclusive that the contracts for grain made by the defendant for the plaintiff were unlawful. They were made in the regular course of business, and for anything that appears in this record they could have been enforced in the courts. It is true they were time contracts—that is, the seller had all the month in which to deliver the grain—but the testimony of Wolcott is they were *bona fide* contracts for the actual purchase of the grain, and the only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month.

Time contracts made in good faith for the future delivery of grain or any other commodity are not prohibited by the common law or any statute of this State, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transac-
51 tions to such a degree as could not but be prejudicial to the best interests of trade. Our present statute was not in force when these dealings were had; consequently the rights of the parties are not affected by it. What the law prohibits and what is deemed detrimental to the public interests is speculations in differences in market values, called, perhaps, in the peculiar language of the dealers, "puts and calls," which simply means privilege to deliver or receive the grain or not, at the seller's or buyer's option. It is against such fictitious gambling transactions we apprehend that the penalities of the law are leveled.

Now, the question is, in the light of the testimony in this case, whether the contracts in question in this case were contracts to buy or sell at a future day, or whether they were simply absolute sales in which the seller had the entire month, the month specified, in which to perform his contract.

This court has found it necessary on several occasions to construe this statute, and has held, with the case which I have just read, that the statute is leveled against what are called puts and calls, that is—the right or the privilege which a party may have to buy or sell of you at a future day, not an absolute agreement now to
52 sell, but where one man pays another $5.00 or $10.00 for the privilege of delivering to him 1,000, 5,000, or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time—a contract which cannot be enforced in terms, because it is wholly at

the option of the party holding the option whether he will call for the grain or not. This is what is termed a gambling contract or a put or call or an option to buy or sell at a future time within the meaning of the Illinois statute.

The plaintiff's testimony tends to show that in conversations about his dealings on the board of trade with the defendant he spoke of the business as gambling; he testified that he stated that he was not afraid to gamble, that he was willing to gamble if he was only treated fairly, and so forth, and hence charges that these transactions were on his part intended to be gambling transactions. Calling a transaction gambling does not make it so. One party cannot so characterize a transaction to the detriment of the other. All dealings in which the element of chance is involved may, by cer-
53 tain loose forms of speach, be called gambling. Any one who buys any commodity with the expectation of an advance in the price—that is, who buys it for the purpose of selling it again at an advance price—may be said to be gambling, because he does not know with certainty whether there will be an advance of price or not in the future, and therefore in this loose form of expression some persons might say that he is gambling upon the future price of the commodity in question; and therefore you find in common speech expressions of this kind, but the real question is, What was the transaction itself?

It is the duty of the court and the jury to look into the testimony and into the transaction itself in the light of the proof and determine whether the dealings of the plaintiff on the board through the defendant's agency were such transactions as are prohibited by the statute or were gambling transactions.

The proof on the part of the plaintiff tends to show that he expected the defendant to deal for him in the manner such dealings were usually conducted on the board of trade, and the
54 plaintiff's proof also tends to show that he was himself quite familiar at the time the transactions in question took place with the methods of dealing on the board of trade.

The controversy in this case involves the dealings by the defendant for the plaintiff in regard to 100,000 bushels No. 2 spring wheat sold by the plaintiff through defendant as his broker on the board in the month of May, 1882, for delivery in July, 1882.

It is conceded that the plaintiff began to deal on the board of trade through the defendant as his broker in December, 1879; that almost continuously through the years 1880, 1881, and the forepart of 1882 he had large operations in various commodities on the board through the defendant as his agent or broker; that about the 19th of April, 1882, there was a settlement between the plaintiff and the defendant of their transactions substantially up to that time; that after such settlement the plaintiff had other dealings on the board through the defendant, among which were the sales of 100,000 bushels July wheat particularly now in question. There were also other dealings by the plaintiff afterwards on the board in which
55 some profits were perhaps made and losses were also made, but leaving in the main results some profits. The $11,412.50

now in controversy is made up partly, as I understand from the proof, from the profits made in these other transactions and partly from moneys placed in the defendant's hands for the purpose of carrying on this 100,000 bushels deal.

The testimony on the part of the defendant tends to show that the mode of making the contracts in question on the board of trade is substantially this: Defendant, as a member of the board of trade, attends the sessions or meetings of the members of the board—what is called goes on change. He there offers to sell, for an illustration, 5,000 No. 2 spring wheat at a given price, say $1.24½, for July delivery. Mr. A. H. Bliss, of the firm of A. H. Bliss & Co., accepts this offer for his firm. A memorandum of this transaction is made by both seller and buyer on a card which they have for the purpose of making such memoranda, and after the adjournment of the board the clerks of the respective parties take these cards, compare and check them off together, and see if they agree, and if they agree the transaction is placed upon the books of the respective parties. The
56 defendant, for instance, being the seller, enters the transaction on his books as a sale for the plaintiff, J. B. W., of 5,000 bushels No. 2 spring wheat, at $1.24½, to be delivered in the month of July to Bliss & Co., and Bliss & Co. enter it upon their books as a purchase from the defendant—that is, from Barber—of this amount of wheat to be delivered during the month of July.

The defendant's proof tends to show that a contract thus made between the members of the board is binding under the rules of the board of trade; that the board of trade does not allow or recognize what are called puts and calls or trades, which are purely optional with the parties for future delivery, and the proof on the part of the defendant also tends to show that under such a contract as this the defendant is bound to deliver the wheat so sold during the month of July, having until the last day of the month in which to make the delivery, and that the purchasers—that is, in the case I have supposed, Bliss & Co., the buyers—are bound to accept and pay for such wheat at the contract price if tendered to them during the month of July.

The proof on the part of the defendant also tends to show that under such a contract made by his broker in his behalf the
57 plaintiff may either tender the wheat at any time during the month of July or he may settle or direct his brokers to do so for him by paying the difference between the price at which he sold and the market price at the time he offered to settle. If the purchaser sees fit to take this difference and settle, and does so, that ends the transaction. If, however, the purchaser insists on the wheat he must then purchase and deliver the wheat, and this is done by buying on the board from some one an equivalent quantity of the same grade of wheat and tendering it. The actual tangible wheat itself is not tendered, but receipts for the wheat stored in elevators or warehouses are looked upon as the representatives of the wheat itself.

The law makes the difference between the price at which an article of this kind is bought and its market price at the time it is to

be delivered the measure of damages for a breach of the contract—that is, if in this case the defendant failed to deliver this wheat to Bliss & Co. during the month of July, he was liable to pay as damages to the purchasers, Bliss & Co., the difference between the contract price and the market price on the last day of July. So,
58 too, if to cover this sale the defendant had, by direction of the plaintiff, bought in an equal quantity from another person, he would have had a claim against the person he bought of for the delivery of this wheat or for damages for non-delivery. So that if sold and bought at the same price the damages for which the defendant was liable in one case would be set off or equaled by the damages which he would be entitled to from the person of whom he bought in the other case.

The mere fact that the parties to such contracts agree to adjust them by payment of differences or that they are in the habit of doing so is not conclusive evidence that these were gambling contracts, because the law fixes the measure of damages for the breach of these contracts, and the parties might as well accept it themselves, if the contract has been broken, and settle it by money as to allow the courts to do so.

If the proof satisfies you that the contracts in question made by the defendant for the plaintiff on the board of trade were contracts by which the defendant was liable to either deliver the grain or pay the damages, then the contract was not a gambling contract, and you should find for the defendant.

59 The proof in this case without dispute, as I understand the position of counsel, shows that certain parties had so manipulated the market of No. 2 spring wheat for July that there was what is called a corner, but there is no proof, nor is it contended, as I understand, that the defendant was one of the parties who had made or caused this corner, nor that the defendant was in any way concerned in the profits of the corner. The proof tends to show that the plaintiff knew or was advised soon after the sale of this 100,000 bushels for July had been made that there was a corner for July, and there is much proof as to the plans and position of the plaintiff in regard to what course he should pursue in view of the fact that such corner existed, and that he might sustain a loss upon the sales which he had made.

The proof tends to show that the plaintiff insisted that he would not buy in and deliver the wheat at this corner price, but that he would contest the differences claimed on the ground that a corner did, in fact, exist; that he insisted on the defendant making default on the contracts and allowing the question to go to a com-
60 mittee of the board of trade to fix the price for settling under the rules of the board; that the plaintiff studied the rules of the board himself, and insisted that the committee of the board of trade should determine and adjust the settling price, as it was called; that after the committee had fixed the price for settling he caused a bill in chancery to be filed in the name of the defendant contesting the price which had been fixed by the committee.

The proof further tends to show that after the time default was made defendant had in his hands about $12,000, held by him, or which had been put up by him as margin to secure his completion of these trades, and that after these defaults had been made a settlement or adjustment was made between the parties, and that the defendant paid over to the plaintiff about $900 of the money in his hands, retaining only what he considered to be and what it was computed would be sufficient to indemnify him for the liability under which he was by reason of the price which had been fixed by the committee of the board of trade.

61 The proof further tends to show that after the supreme court of this State had decided upon a case similar to that brought by the plaintiff in the defendant's name that the action of the board was so far binding upon the members of the board that the court would not interfere and would not prevent the board of trade from enforcing its own rules upon its own members in transactions like this. Complaints were made to the board against the defendant by the parties to whom he had sold this wheat, and such proceedings were taken by the board that the defendant was in danger of being expelled from the board and losing his membership for his refusal and neglect to settle these contracts on the basis fixed by the committee, and that the defendant then paid $10,193.25 of the money then in his hands in adjustment of these differences and applied the balance to the payment of his commissions and $968.75 which he had advanced on these trades out of his own funds.

The proof, as I have said, tends to establish this state of facts, and the question is, Were these gambling contracts or con-
62 tracts to buy or sell at a future day within the meaning and intent of the Illinois statute? Were they options to buy or sell, or, as the court in the case I have cited designates them, were they puts and calls, or were they legitimate transactions such — are sanctioned by the law and could be enforced by the award of damages in case of a breach? Would the courts, if suit had been brought on these contracts between the defendant and Bliss & Company, or any of the other firms to whom he had made these sales, have sustained them and given as damages the difference between the contract price and the price on the last day of July? If the defendant was legally bound to deliver the wheat, to pay damages for non-delivery, then the contracts were not gambling contracts—that is, if the defendant was bound to deliver this grain or pay damages for non-delivery within a fixed time, for instance, the month of July, then the contracts were legal and binding, and the mere fact that the plaintiff expected that he could, either by the payment of differences or by covering, as he calls it, his liability by other similar transactions on the other side of the market, so manipu-
63 late his trades or set off one against another as to relieve himself from the necessity of actually delivering or accepting the grain itself, does not of itself change the plaintiff's legal liability to the defendant as his agent in these dealings.

It is no part of your province and no part of your duty in the

trial of this case, gentlemen, to try or attempt to rectify the case which was brought by the defendant against the board of trade and decided by the supreme court of this State.

As I have already said, unless the defendant had something to do with making the corner in question and victimizing the plaintiff by inducing him to sell wheat for July when he knew it would be cornered for that month, then the defendant is not liable by reason of the corner having existed; nor can you consider or pass upon the question whether the committee of the board of trade decided rightly or not. The supreme court, in the case referred to, fully passed upon that question, and held that it was within the power of the committee of the board of trade, under the rules of that
64 board, as between the members of that board, to adjust and fix the price of wheat, or the difference between the price at which settlements should be made for sales of wheat for July delivery.

That was a question over which the supreme court say the board of trade had full and exclusive jurisdiction so far as its members were concerned.

So, also, if the proof satisfies you that the plaintiff employed the defendant to deal for him as his broker on the board of trade according to the rules and usages of the board as enforced between its members, and if the proof satisfies you that he did so deal for the plaintiff and incurred liability under the rules of the board to the extent of the money in question by reason of such dealings for the plaintiff, then there is an implied contract on the part of the plaintiff to indemnify the defendant from liability for such dealings, and the defendant had a right to apply the money of the plaintiff in his hands for the purpose of such dealings and the payment of such liabilities.

As I have already said, whether the market was cornered or not is immaterial for the purposes of this case, unless the proof
65 satisfies you that the defendant was the person or one of the persons by whom the corner was produced.

Then, as I have already said, if you find that the dealings by the defendant for the plaintiff were gambling contracts—that is, if they were options to buy or sell at a future day—then the defendant is liable for the amount of $11,412.50 in controversy here and interest from the date of the demand, and your verdict should be for the plaintiff.

If, on the contrary, you find from the proof that the dealings conducted for the plaintiff by the defendant were contracts by which the grain was to be absolutely delivered during the month of July, the only option being the time when during the month the delivery should be made, then the defendant is not liable and your verdict should be for the defendant.

The form of your verdict simply will be, "We, the jury, find the issues for the plaintiff or the defendant." If you find the issues for the plaintiff you will then say what the plaintiff's damages will be, which should be the amount of money in question and interest from the time the demand was made.

66 And the court further explained to the jury that the "option to buy or sell" prohibited by sec. 130, chap. 38, of the Revised Statutes means a privilege which the buyer or seller may or may not exercise at his option, and that a contract by which the seller absolutely agrees to deliver a certain commodity to the buyer within a specified time, when the only option is as to the delivery within a certain time, such as within the whole of some month named, is not a gambling contract within the meaning of this statute.

To which instructions of the court so given to the jury the plaintiff duly and at the proper time objected & excepted, & the plaintiff also especially objected and excepted to the following propositions in & portions of said charge, to wit: "The question of fact for you to determine under the proof is whether these dealings made by the plaintiff on the board of trade through the defendant as his broker were gambling contracts within the meaning of the law. The statute of the State of Illinois upon this subject I will now read you.

Section 140 of chapter 38 reads as follows: Whoever contracts to have or give himself or another the option to sell or buy at a
67 future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein or corners the market, or attempts to do so, in relation to any such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or be confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void. The plaintiff contends that the contracts in question made by the defendant for him and in his behalf were gambling contracts within the meaning of this law. The question then arises, What kind of contracts are prohibited by this statute? You will notice the language is, "Whoever contracts to have or give himself or another the option to sell or buy at a future time"—an option to sell or buy at a future time. The courts have construed to some extent the meaning of this statute, and I will read from a case decided by the supreme court of this State the construction which is given upon it.

"The evidence in this record is by no means conclusive that
68 the contracts for grain made by the defendants for the plaintiffs were unlawful; they were made in the regular course of business, and, for anything that appears in this record, they could have been enforced in the courts.

"It is true they were time contracts—that is, the seller had all of the month in which to deliver the grain, but the testimony of Wolcott is they were *bona fide* contracts for the actual purchase of the grain, and the only option the seller had was as to the time of delivery.

The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts made in good faith for the future delivery of grain or any other commodity are not prohibited by the common law or any stutue of this State, nor by any policy beneficial to the public welfare. Such

a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade. Our present statute was not in force when these dealings were had; consequently the rights of the parties were not affected by it.

69 What the law prohibits and what is deemed detrimental to the public interests is speculations in differences in market values called, perhaps, in the peculiar language of the dealers, puts & calls, which simply means privilege to deliver or receive the grain or not at the seller's or buyer's option. It is against such fictitious gambling transactions, we apprehend, that the penalties of the law are leveled."

Now, the question is, in the light of the testimoney in this case, whether the contracts made between the parties in this case—the contracts in question in this case—were contracts to buy or sell at a future day, or whether they were simply absolute sales, in which the seller had the entire month—the month specified—in which to perform his contracts.

This court has found it necessary on several occasions to construe this statute, & has held that with the case which I have just read that the statute is leveled against what are called there puts and calls—that is, the right or the privilege which a party may have to buy or sell of you at a future day, not an absolute agreement

70 now to sell, but where one man pays another $5.00 or $10.00 for the privilege of delivering to him 1,000, or 5,000, or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time—a contract which cannot be enforced in terms, because it is wholly at the option of the party holding the option whether he will call for the grain or not.

This is what is termed a gambling contract or a put or call, or called an option to buy or sell at a future day. within the meaning of the Illinois statute.

And the plaintiff also duly and at the proper time objected and excepted to the following instruction given by the court to the jury, to wit:

"The option to buy or sell prohibited by this statute means a privilege which the buyer or seller may or may not exercise at his option," and that a contract by which the seller absolutely agrees to deliver a certain commodity to the buyer within a specified time, when the only option is as to the delivery within a certain time, such as within the whole of a given month, is not a gambling contract within the statute.

71 And thereupon the jury returned their verdict in favor of the defendant and against the plaintiff; to which the plaintiff, by his counsel, then and there excepted, and then and there moved the court to set aside said verdict and grant a new trial in said cause, and filed therein his motion in writing for a new trial as follows:

Motion.

In the Circuit Court of the United States, Northern District of Illinois.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

And now comes the said plaintiff, by Stiles and Lewis, his attorneys, and moves the court to set aside the verdict and grant a new trial in said cause, and shows to the court here the following grounds therefor:

1st. The court erred in its charge to the jury.

72 2nd. The court erred in its charge to the jury in the construction given in said charge to section 130 of chapter 38 of the criminal code of Illinois.

3d. The court erred in charging the jury that in order that the plaintiff might recover they must find that the contracts in question were gambling contracts within the meaning of said section 130.

4th. The court should have instructed the jury that if they believed that the contracts in question were gambling contracts, either within the statute or at common law, then the plaintiff might recover.

5th. The following portion of the charge to jury was erroneous:

"The question of fact for you to determine under the proof is whether these dealings made by the plaintiff on the board of trade through the defendant, as his broker, were gambling contracts within the meaning of the law. The statute of the State of Illinois upon the subject I will now read you. Section 130 of chapter 38 reads as follows:

"'Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or be

73 confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void.'"

The plaintiff contends that the contracts in question made by the defendant for him and in his behalf were gambling contracts within the meaning of the law.

The question then arises, "What kind of contracts are prohibited by this statute?" You will notice the language is, "Whoever contracts to have or give to himself or another the option to sell or buy at a future time"—an option to *to* sell or buy at a future time.

The courts have construed to some extent the meaning of this statute, and I will read from a case decided by the Supreme Court of the United States the construction which is given upon it:

"The evidence in this record is by no means conclusive that the contracts for grain made by the defendants for the plaintiff were unlawful. They were made in the regular course of business and, for

anything that appears in this record, they could have been enforced in the courts. It is true they were time contracts—that is, the seller had all of the month in which to deliver the grain—but the testimony of Wolcot is they were *bona fide* contracts for the actual purchase of the grain, and the only option the seller had was as to the time of delivery.

"The obligation was to deliver the grain at all events, but
74 it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month.

"Time contracts made in good faith for the future delivery of grain or any other commodity are not prohibited by the common law or any statute of this State, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of the trade. Our present statute was not in force when these dealings were had; consequently the rights of the parties are not affected by it. What the law prohibits and what is deemed detrimental to the public interests is speculations in differences in market values, called, perhaps, in the peculiar language of the dealers, 'puts and calls,' which simply means a privilege to deliver or receive the grain or not at the seller's or buyer's option. It is against such fictitious gambling transactions, we apprehend, that the penalties of the law are applied."

Now, the question is, in the light of the testimony in this case, whether the contracts made between the parties in this case, the contracts in question in this case, were contracts to buy or sell at a future day, or whether they were simply absolute sales, in which the seller had the entire month, the month specified, in which to perform his contracts.

This court has found it necessary on several occasions to construe this statute and has held, with the case which I have just
75 read, that the statute is leveled against what are called these puts and calls—that is, the right or the privilege which a party may have to buy or sell of you at a future day, not an absolute agreement now to sell, but where one man pays another $5.00 or $10.00 for the privilege of delivering to him 1,000, 5,000, or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time—a contract which cannot be enforced in terms, because it is wholly at the option of the party holding the option whether he will call for the grain or not. This is what is termed a gambling contract, or a put and call, or called an option to buy and sell at a future day within the meaning of the Illinois statute."

6th. The court erred in its supplemental charge to the jury after they had retired to consider of their verdict, which supplemental charge was as follows:

The court, at the request of the jury, read to the jury sec. 130, chap. 38, Rev. St. of Ill., and then explained further to the jury that the "option to buy or sell" prohibited by this statute means a privilege which the buyer or seller may or may not exercise at his option, and that a contract by which the seller absolutely agrees to deliver

a certain commodity to the buyer within a specified time when the only option is as to the delivery within a certain time, such as within the whole of some month named, is not a gambling
76 contract within the meaning of this statute."

7th. The verdict of the jury was contrary to the evidence.

8th. The verdict of the jury was contrary to the law of the case.

Wherefore the plaintiff prays that said verdict may be set aside and a new trial granted.

STILES & LEWIS,
Attorneys for Plaintiff.

Endorsed: Filed Feb'y 23, 1884. Wm. H. Bradley, clerk.

And afterwards the court overruled said motion; to which action of the court the plaintiff, by his counsel, then and there excepted.

And thereupon the court entered judgment on the said verdict in favor of the defendant and against the plaintiff; to which judgment the plaintiff, by his counsel, then and there excepted.

And, inasmuch as the matters and things aforesaid do not appear of record in said cause, the plaintiff prays that this his bill of exceptions therein may be signed, sealed, and filed therein, which
77 is done accordingly this — day of April, A. D. 1884.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed May 27, 1884. Wm. H. Bradley, clerk.

78 Afterwards, to wit, on the thirty-first day of May, A. D. 1884, there was filed in said clerk's office an appeal bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

In the Circuit Court of the United States for the Northern District of Illinois. At Law.

JAMES B. WHITE, Plaintiff, *v.* GEORGE M. BARBER, Defendant.

Know all men by these presents that we, James B. White, as principal, & James Lillie, as sure*ties*, are held & firmly bound unto George M. Barber in the sum of five hundred dollars, to be paid to the said George M. Barber, his heirs & assigns; — which payment, well & truly to be made, we bind ourselves and each of us, jointly & severally, and our & each of our heirs, executors, & administrators, firmly by these presents.

Sealed with our seals & dated this 27 day of May, A. D. 1884.

Whereas the above-named James B. White has sued out a writ of error in said cause requiring the proceeding to be duly certified & to remove said cause to the Supreme Court of the United States to reverse the judgment rendered therein by the Hon. H. W.
79 Blodgett, judge of the said circuit court for said district, on the 27 day of May, 1884:

Now, therefore, the condition of this obligation is such that if the above-named James B. White shall prosecute his said writ of error

to effect & answer all costs if he shall fail to make good his plea in that behalf, then this obligation shall be void; otherwise to remain in full force & effect.

JAMES B. WHITE. [SEAL.]
JAMES LILLIE. [SEAL.]

Approved:
H. W. BLODGETT, *Judge.*

Endorsed: Filed May 31, 1884. Wm. H. Bradley, clerk.

80 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein James B. White is the plaintiff and George M. Barber is the defendant as the same appear from the files and records of said court now remaining in my custody and control.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-fourth day of June, A. D. 1884.

[Seal of Circuit Court U. S., Northern Dist. Illinois.]

WM. H. BRADLEY, *Clerk.*

81 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between James B. White, plaintiff, and George M. Barber, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said James B. White, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1884, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of May, in the year

of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 108th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. of Ills.

82 [Endorsed:] Supreme Court of the United States. James B. White, plaintiff in error, *vs.* George M. Barber. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

83 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To George M. Barber, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein James B. White is plaintiff & George M. Barber is defendant, to show cause, if any there be, why the errors in said proceedings & judgment mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. W. Blodgett, presiding judge on trial of said case, this 27 day of May, in the year of our Lord one thousand eight hundred and eighty-four.

H. W. BLODGETT, *Judge.*

84 [Endorsed:] Supreme Court of the United States. James B. White *vs.* George M. Barber. Citation to October term, A. D. 1884.

I hereby accept service of the within citation this 27th day of May, 1884.

GEORGE M. BARBER.

85 *Assignment of Errors.*

Supreme Court of the United States, of the October Term, in the year of our Lord one thousand eight hundred end eighty-four.

JAMES B. WHITE *vs.* GEORGE M. BARBER.

And afterwards, to wit, on the second Monday of October, 1884, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said James B. White, the said plaintiff in error in said cause, by Lindley M. Ninde, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court below erred in rendering judgment in said cause in favor of the said defendant in error and against the said James B. White, the plaintiff in error.

Second. The said court below erred in overruling the motion of the said James B. White, plaintiff in error, to set aside said verdict and for a new trial in said cause.

Third. The court below erred in its charges to the jury on the trial of said cause.

Fourth. The court below erred in giving to the jury that portion of its charges set forth and contained in the written motion of said James B. White, the plaintiff in error, for a new trial of said cause.

Fifth. The court below erred in charging the jury on the trial of said cause as follows:

86 The question of fact for you to determine under the proof is whether these dealings made by the plaintiff on the board of trade through the defendant as his broker were gambling contracts within the meaning of the law. The statute of the State of Illinois upon the subject I will now read you. Section 130 of chapter 38 reads as follows:

Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any such commodities, shall be fined not less than ten dollars nor more than one thousand dollars or be confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

The plaintiff contends that the contract in question made by the defendant for him and in his behalf were gambling contracts within the meaning of this law.

The question *that* arises, What kind of contracts are prohibited by the statute? You will notice the language of the statute is: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time"—an option to sell or buy at a future time.

The courts have construed to some extent the meaning of this statute, and I will read from the case decided by the Supreme Court of the United States the construction which is given upon it.

The evidence in this record is by no means conclusive that contracts for grain made by the defendant for the plaintiff were unlawful. They were made in the regular course of business,

87 and for anything that appears in this record they could have been enforced in the courts. It is true they were time contracts—that is, the seller had all of the month in which to deliver the grain—but the testimony of Wolcot is they were *bona fide* contracts and actual purchase of the grain, and the only option the seller had was as to the time of delivery.

The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last of the month.

Time contracts made in good faith for the future delivery of grain or any other commodity are not prohibited by the common law or

any statute of this State, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of the trade.

Our present statute was not in force when these dealings were had; consequently the rights of the parties are not affected by it. What the law prohibits and what is deemed detrimental to the public interests is speculations in differences in market values, called perhaps, in the pecular language of the dealers, "puts and calls," which simply means a privilege to deliver or receive the grain or not, at the seller's own option.

It is against such fictitious gambling transactions we apprehend that the penalties of the law are applied.

Now, the question —, in the light of the testimony in this case, whether the contracts made between the parties in this case, the contracts in question in this case, were contracts to buy or sell at a future day, or whether they were simply absolute sales in which the seller had the entire month, the month specified, in which to perform his contracts.

88 This court has found it necessary on several occasions to construe this statute, and has held, with the case I have just read, that the statute is leveled against what are called these "puts and calls—that *it* is, the right or privilege which a party may have to buy or sell of you at a future day, not an absolute agreement now to sell, but when one man pays another $5.00 or $10.00 for the privilege of delivering to him 1,000, 5,000, or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time—a contract which cannot be enforced in terms, because it is wholly at the option of the party holding the option whether he will call for the grain or not. This is what is termed a gambling contract or a put and call, or called an option to buy and sell at a future day within the meaning of the Illinois statute.

6th. The court below erred in its charge to the jury as follows: The option to buy or sell prohibited by this statute means a privilege which the buyer or seller may or may not exercise at his option; and that a contract by which the seller absolutely agrees to deliver a certain commodity to the buyer within a specified time, when the only option is as to the delivery within a certain time, such as within the whole of some month named, is not a gambling contract within the meaning of the statute.

And the said James B. White prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, & that he may be restored to all things which he hath lost by occasion of the said judgment.

By LINDLEY M. NINDE,
Attorney for Plaintiff in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 350. James B. White, plaintiff in error, *vs.* George M. Barber. Filed 8th October, 1884.

23-392

Office Supreme Court U. S.
FILED.
SEP 23 1887
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

No. 350.

JAMES B. WHITE,
Plaintiff in Error.

V.

GEORGE M. BARBER,

BRIEF FOR PLAINTIFF IN ERROR.

By L. M. NINDE,
His Attorney.

FORT WAYNE, IND.
1887.

College Press Print: Fort Wayne, Ind.

Supreme Court of the United States

No. 350.

JAMES B. WHITE,
Plaintiff in Error.

V.

GEORGE M. BARBER.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff sued defendant in the Superior Court of Cook county, Illinois, to recover the sum of fifteen thousand dollars for goods sold and delivered by the plaintiff to defendant and for like sum for money advanced and for money laid out and expended, and for money lent by the plaintiff to the defendant, and for money had and received by the defendant, and to and for the use of the plaintiff, and for interest due thereon, and for work and labor, and for money due the plaintiff from the defendant on an accounting theretofore had between them. Printed record, p. 3 and 4. To this complaint the defendant appeared and pleaded the general issue, and on his motion the cause was removed to the United States Circuit Court for the Northern District of Illinois. Record, pp. 6, 7 and 8.

The cause was tried in the Court below before a jury and resulted in a verdict for the defendant and a judgment thereon, to reverse which the plaintiff prosecutes this writ of error. Record, p. 8 and 9.

There was a large amount of testimony introduced upon the trial, the substance of which is contained in the bill of exceptions on pp. 9 to 20 inclusive. The charges of the Court are also contained in the bill of exceptions on pp. 20 to 28 inclusive, to which charges and to special parts thereof exceptions were duly reserved.

The plaintiff filed his motion for a new trial, pp. 29 to 31 inclusive, which was overruled and exceptions to said ruling duly reserved, p. 31. The writ of error, notice to defendant, with his acceptance of service and the appeal bond duly appear in the record. The bill of exceptions contains the substance of the testimony offered by the plaintiff on the trial. The plaintiff himself tes tified that he was a merchant and resided at Fort Wayne, Indiana, and that the defendant resided at Chicago and was a broker and doing business on the Board of Trade. That defendant was introduced to plaintiff by one Maltman, who was the plaintiff's purchasing agent at Chicago, in September, 1879, and the plaintiff sent divers orders through Maltman to defendant for transactions on the board from September till December, 1879, when the plaintiff came to Chicago and became personally acquainted with defendant, and afterwards sent his orders directly to defendant. That he continued to do business with defendant during the years 1879, 1880, 1881 and 1882, buying and selling on the Board through defendant as broker corn, wheat, oats, pork and other commodities, and about the 9th of

April, 1882, they had a settlement in which all previous dealings were adjusted. That up to that time the transactions made through defendant on the Board amounted in 1879 to $105,000, in 1880 to $1,718,000, in 1881 to $640,000 and in 1882 to $672,000, in all to $3,135,000.

That in 1879 and at other times prior to April, 1882, the plaintiff had conversations with defendant in which he told defendant that he, the plaintiff, was a merchant in Fort Wayne and did not want it known that he was speculating on the Board of Trade in Chicago as it might affect his credit, and that the account could be kept in the name of Maltman. That the plaintiff thought it was a hazardous business, but was willing to gamble provided he could have a fair show. That he wanted his deals placed in the hands of responsible parties so that he could get his money when it was made. That he did not want any of the property, but meant simply to do a gambling business. That the defendant said he knew what the plaintiff wanted. That Maltman had explained the plaintiff's situation and business to him. That the defendant said he would deal only with responsible parties, and the deals should be settled so as to get the profits or losses. That the defendant told him—the plaintiff—that not one bushel in a million that was bought and sold on the Board was legitimate business. That a few of the large houses did some legitimate business, but most of it was simply trading in differences. That he —the defendant—did nothing but business of the latter kind.

The plaintiff further testified that up to April, 1882, he never delivered or received any of the property so sold or bought, nor was anything ever said by the defendant to

him about receiving or delivering property of any kind or making arrangements to do so. That from time to time defendant rendered statements to me—the plaintiff—showing the deals made, the price at which the commodity was bought and sold, the difference in dollars and cents, the commissions charged and the total debit or credit passed to my account. All the deals were in form contracts for future delivery in which the seller had the option of delivering at any time during some future month. That up to April, 1882, all trades made by defendant for plaintiff had been settled or closed by counter trades prior to the month in which delivery could be made. That the names with whom the trades were made were never reported to plaintiff and he never knew them. That after the settlement in April he commenced selling wheat for July delivery, and by the last of May had sold 100,000 bushels for that delivery which were the trades in question. That there was a corner in July wheat and the prices were forced up 10 or 12 cents per bushel. That on the last of July the plaintiff came to Chicago when the defendant proposed to tender No. 2 red winter wheat. That the kind sold was No. 2 spring wheat. That No. 2 red winter is intrinsically more valuable than No. 2 spring, but on the last of July the former stood at 98 cents per bushel and the latter at $1.35 to $1.37. The plaintiff knew of the tender and did not object. That the tender was made and rejected. That the tender was made under the following rule of the Board of Trade, viz:

"On contracts for grain for future delivery the tender of the higher grade of the same kind of grain as the one contracted for shall be deemed sufficient provided the higher grade of grain tendered shall not be of

a color or quality that will depreciate the value of the other if mixed."

The plaintiff then testified to the various deals from September, 1879, till April, 1882, the defendant made for him amounting to the sum above stated, and that nothing had been delivered or received upon said contracts, nor had defendant made any suggestion to deliver. That it was never expected to handle the property but merely to trade in the differences. Up to the close of the July deal, 1882, no demand had been made on plaintiff, by Barber, for the delivery of wheat, corn, or any other commodity.

That plaintiff received the following statement of account from defendant about the day of its date, which was read in evidence:

"CHICAGO, *Oct. 30th*, '82.

A. S. Maltman (J. B. W.) in acc't with G. M. Barber, Cr.

1882.		
July 1.	By balance	12,000 00
3.	" draft	3,000 00
Sept. 11.	" profit as per statement rend	93 25
12.	" " " " " "	2,018 75
27.	" " " " " "	318 75
Octo. 26.	" " " " " "	300 00

DEBIT.

July 31.	To loss as per statement rend	2,668 75	
Aug. 11.	" " " " " "	100 00	
Sept. 12.	" draft	3,000 00	
Octo. 27.	" loss as per statement rend	400 00	
30.	" draft	987 50	
	To balance	11,412 50	
		$18,568 75	$18,568 75
26	Octo. 30. By balance, being diff. between price		11,412 50

Plaintiff further testified that on April 2, 1883, he served the following notice on defendant by delivering to him a copy thereof, and that the defendant read the notice and admitted he had the money in his hands but declined to pay it over. The notice is as follows:

"To G. M. Barber, Esq.:

"In a statement by you, dated October 30th, 1882, of deals made on my account on the board of trade, Chicago, you acknowledge a balance in your hands of $11,412.50 in my favor, being, so the statement says, the difference between price you sold 100 M in July spring wheat for me and the settling price of same as fixed by the board of trade,
27 $1,35, including your commission of ¼ cent; now you are hereby notified that I claim all contracts for sale of said wheat to be illegal and void, and forbid you to pay over any part of said money or balance to any one, and I further demand the immediate payment thereof to myself.

"Dated Chicago, April 2nd, 1883.

"JAMES B. WHITE."

The plaintiff called the defendant as ~~State~~ witness who testified that after the notice was served on him in April, 1883, he paid over to the various parties to whom he had sold the wheat in question the sum of $11,412.50 less the amount of his commissions which were $250 and on cross-examination he stated he made said payments because he had to pay or be suspended from the Board.

The plaintiff then rested.

Said testimony appears in printed record, pp. 10 to 15 inclusive.

The defendant testified upon getting White's orders to sell the wheat in controversy, he would go on the Board and offer to sell so much wheat at such a price and some other broker would accept the offer and thereupon both

parties made a memorandum of the trade on a card. That such memorandum was usually as follows:

"10 M, July. H. G. Gaylord, $1.25⅛. J. B. W."

That this was the only writing made in the hurry of business on the Board; that "10 M" meant 10,000 bushels; "July" meant for delivery in July at the seller's option; that No. 2 spring wheat was understood that H. G. Gaylord was the name of the broker to whom the sale was made; that "$1.25⅛" denoted the price and the initials "J. B. W." indicated that the sale was on account of plaintiff; that the 100,000 bushels sold for delivery in July was sold in this way and all upon the same kind of contract; that the grain was to be delivered or received; that "puts" and "calls" or mere options to buy or sell were not recognized on the Board; that it is customary where a commodity is sold to and bought of the same broker upon different orders for the brokers to settle their trades by paying the differences; that in trading for White he had received and delivered property; had received as high as 60,000 bushels in a day, but could not recall any trade for White in which he had received any commodity, but thought he had, when the 100,000 bushels in question were sold he expected it would be delivered.

The witness, Burns, testifies he had bought of Barber 5,000 bushels; that the contract was made in the regular way, and there was no secret understanding that it was not to be delivered. It was admitted that the other brokers who bought the wheat in controversy would testify the same as Burns did.

Some other testimony was introduced, but not ma-

Fifth. The Court below erred in charging the jury on the trial of said cause as follows:

"The question of fact for you to determine under the proof is whether these dealings made by the plaintiff on the Board of Trade through the defendant, as his broker, were gambling contracts within the meaning of the law. The statute of the State of Illinois I will now read you:

"Section 140 of chapter 38 reads as follows: 'Whosoever contracts to have or give himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities shall be fined not less than ten dollars nor more than one thousand dollars, or be confined in the county jail not exceeding one year or both, and all contracts made in violation of this section shall be considered gambling contracts within the meaning of this law. The question then arises, what kind of contracts are prohibited by this statute? You will notice the language is, 'whoever contracts to have or give himself or another the option to sell or buy at a future time'—an option to sell or buy at a future time. The Courts have construed to some extent the meaning of this statute, and I will read from a case decided by the Supreme Court of this State, the construction which is given upon it.

"The evidence in this record is by no means conclusive that the contracts for grain made by the defendants for the plaintiffs were unlawful; they were made in the regular course of business and for anything that appears in this record, they could have been enforced in the Courts. It is

true they were time contracts—that is, the seller had all of the month in which to deliver the grain, but the testimony of Walcott is they were *bona fide* contracts for the actual purchase of the grain and the only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts made in good faith for the future delivery of grain or any other commodity are not prohibited by the common law or any statute of this State, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade. Our present statute was not in force when these dealings were had consequently the rights of the parties were not affected by it. What the law prohibits and what is deemed detrimental to the public interest is speculations in differences in market values, perhaps, in the peculiar language of the dealers, "puts" and "calls," which simply means privilege to deliver or receive the grain or not at the seller's or buyer's option. It is against such ficticious gambling transactions we apprehend that the penalties of the law are leveled.'

"Now the question is in the light of the testimony in this case whether the contracts made between the parties in this case—the contracts in question in this case—were to buy or sell at a future day, or whether they were simply absolute sales, in which the seller had the entire month—the month specified—in which to perform his contracts. This Court has found it necessary on several occasions to construe this statute, and has held that with the case I

have just read, that the statute is leveled against what are called there "puts" and "calls"—that is the right or the privilege which a party may have to buy or sell of you at a future day, an absolute agreement not to sell, but where one man pays another $5.00 or $10.00 for the privilege of delivering to him 1,000, or 5,000, or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time—a contract which cannot be enforced in terms because it is wholly at the option of the party holding the option whether he will call for the grain or not. This is what is termed a gambling contract or a "put" and "call," or called an option to buy or sell at a future day within the meaning of the Illinois statute."

Sixth. The Court below erred in its charge to the jury as follows: "The option to buy or sell prohibited by this statute means a privilege which the buyer or seller may or may not exercise at his option and a contract by which the seller absolutely agrees to deliver a certain commodity to the buyer within a specified time when the only option is as to the delivery within a certain time such as within the whole of some month named, is not a gambling contract within the meaning of the statute."

And the said James B. White prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said judgment.

By LINDLEY M. NINDE.
Attorney for Plaintiff in Error.

A strong preponderance of the evidence showed that

the agreement between the plaintiff and defendant was that the defendant should deal in margins only for the plaintiff on the Board of Trade by entering into contracts legitimate in form but in substance gambling contracts under the statute. This question was taken from the jury by the charge that if the contracts were not in the form of "puts" or "calls" they were not within the statute and the verdict must be for the defendant. The defendant held in his hands on October 30, 1882, $11,412.50 of the plaintiff's money as shown by the account then rendered plaintiff, p. 12. He still held this money when the notice was served on him not to pay it out on the 2d of April, 1883. p. 13. See Barber's admission at bottom of p. 16.

ARGUMENT.

First.—The first and principal question is whether the charge of the Court that "puts" and "calls" only were prohibited by the State, and that the contracts in question were valid and not prohibited by said statute, stated the law correctly.

The terms of section 130, chapter 38, of the statutes of Illinois is as follows.

"Whoever contracts to have or give himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or be confined in the county jail not exceeding one year, or both, and all such contracts made in violation of this section shall be considered gambling contracts and shall be void."

That what the Court in its charge, described as a "put" or "call" is clearly within the statute there can perhaps, be no doubt.

To contract for an option is to contract for the priv-

ilege of buying or selling at a future day at a given price.

See Worcester. Such options are generally paid for in advance. Such contract is void and gives no legal right to the party holding it to make the purchase or sale. But is the statute limited to such operations? It is just as clearly an option whether the consideration for the right to buy or sell is paid in advance, or to be paid at the time the election is made. If A agrees with B in consideration, of $10 paid in cash that B may have the option to sell him 1,000 bushels of wheat in ninety days for $1,000 it is void because the consideration of the trade depends upon the option of A, and B cannot enforce it.

If A should make the same contract with B, inconsideration of $10 to be paid at the end of ninety days it is equally an option and void. But suppose the contract in fact is that A agrees to sell B 1,000 bushels of wheat in ninety days at $1 per bushel, but that he has the right if the wheat is then worth $1.25 to pay the margin of the 25 per cent., and thus liquidate his contract. Here the only difference is that the consideration given for the option to sell is paid at the end of the time instead of the beginning, each contract is equally an option, and within the statute. But such contracts are generally double instead of single. They contain two options instead of one. Such were the contracts in the case at bar. A sells to B 1,000 bushels of wheat at ninety days upon the agreement that if wheat advances he shall not be compelled to deliver, but may pay the amount of the advance, and B, by the terms of the contract, is not bound to take the wheat if it declines, but may pay the difference, and thus liquidate the contract. By such a contract, whether the wheat goes up or down, there is to be no delivery. There is a double option

—one operating in favor of each party—and two clear violations of the statutes instead of one. Both options are strictly prohibited by the statute. The charge of his Hon. Judge Blodget, would have been a correct definition of what was prohibited by the statute if the statute had said: "Who ever contracts(for a price paid in advance) to have or give to himself an option." But the statute forbids the contract for an option equally whether the consideration for it is fixed and paid for it in advance or to be fixed by future events, and then paid. Those options that are paid for at once are much less dangerous than such as are to be determined by future events and then paid for. The hope of the gambler is much more stimulated by the latter than the former. All the considerations whether of morals or public policy, is for the same reasons opposed to either of said classes of options, and I submit they are both equally void under the ~~contract~~ statute.

But the question still arises whether such a contract, in substance void, but by the precaution and ingenuity, parties entered into in the form of an absolute agreement to sell or buy is absolutely valid, and that neither party to it can be allowed to prove the actual understanding to avoid it.

The proposition given to the jury by the Court in its charges, was that such contract, if in form valid, could not be attacked by proof of the actual agreement between the parties. If it was in terms a contract to buy or sell wheat to be delivered at a future day, it was valid and could be enforced.

This case was tried in the court below before the opinion of this Court in Irwin v. Millair, 110 U. S., 499, was published.

This Court, in deciding said cause copies from Benjamin on Sales, with approval, the following statement:

"* * that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller, and the price to be paid by the buyer; and, if under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void."

In this same case it is held that if the broker is privy to the unlawful designs of the parties he is *particeps criminus*, and cannot recover for services rendered or losses incurred. It is also held that such contracts are held to be void in this country as against public policy.

But the true meaning of this statute is conclusively settled by the courts of the state of Illinois.

In the case of Tenney v. Foote, 95 Ill., 99, this question was directly decided. The report says "the dealings were in form purchases and sales of grain for future delivery."

The contract between Foote and his broker was that such purchases and sales should be settled by the payment of differences, and not by the delivery and payment for the grain. Such settlements were made and differences in losses paid by the brokers to the amount of $22,000, for $20,000 of which Foote assigned to them paper and guaranteed the payment of it. This was sold to Tenney, and he sued Foote on the guarantee. The Court held that because the contract authorized dealing in dif-

ferences it was void and the guarantee without consideration.

4 Bradnell's Rep., 594.

The question is also thus decided in Pickering v. Case, 79 Ill., 328. On p. 330 the Court says:

"What the law does prohibit and what is deemed detrimental to the general welfare is speculating in differences in market values. The alleged contracts for August and September come within this distinction. No grain was ever bought and paid for; nor do we think it was ever expected any would be called for, or that any would have been delivered, had demand been made. What were these but 'optional contracts' in the most objectionable sense—that is the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain just as they choose, on the maturity of the contracts, they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions the law will tolerate no such contracts."

These transactions, as I have said, are in substance double "puts" and "calls" instead of single ones. The Courts of Illinois have uniformly followed these decisions, and they are now the settled law of that State. See McCormick v. Nichols, Chicago Legal News, October 2, 1886, also reported in 19 Bradnell.

Pearce v. Foote, decided by the Supreme Court of Illinois, February 7, 1885, held that Foote could recover the money collected by a voluntary assignee of one of the four notes assigned to his brokers to pay the losses they had incurred for him settling difference in dealing for him on the Board of Trade.

Chicago Legal News, July 11, 1885.

Coffman v. Young, Chicago Legal News, July 17, 1886.

It was held in this case that a charge that although the contracts were in form for the purchase or sale of grain for future delivery, yet if the parties understood that said contracts should be settled by paying the dif-

ference in the market price, they were within the statute, and void.

Beveridge v. Hernett, 8 Bradwell, 467,
Lyon v. Culbertson, 83 Ill., 33,
Gilbert v. Cook, 2 Chicago Legal News, 208.
Calderwood v. McRea, 11 Bradnell, 543.

A most thorough discussion of the statute and the gambling contracts under it, by the Supreme Court of Illinois, appears in Pearce v. Foote, 113 Ill., 228. The opinions were delivered long after this trial was had in the court below. Foote had contracted with Hooker & Co., who were brokers and members of the board of trade, to buy and sell for him on the board, and settle said trades, paying and collecting the differences in prices. Transactions of that character had been made by Hooker & Co., in their own names, but for Foote, till his losses were over $22,000. Both the contract employing the brokers, and their transactions were precisely White's contract with Barber, and the latter's dealings on the board in the case at bar. Foote settled the balance of the account by paying $2,000 cash, and and assigning four notes of $5,000 each to Hooker & Co., and the suit was to recover back the amount collected on one of said notes or perhaps its value. Foote recovered judgment for the amount of the note and interest which the Supreme Court affirmed. The Court says:

"The true idea of an option is what is called in the peculiar language of the dealers "puts" and "calls." A "put" is defined to be the privilege of delivering or not delivering the thing sold, and a "call" is defined to be the privilege of calling for or not calling for the thing bought. Optional contracts in this sense are usually settled by adjusting market values as the party having the "option," may elect. It is simply a mode adopted for speculating in differences in market values of grain or other commodities. It must have been in this sense the term "option" is used in the statute. Such a contract is obviously

fictitious, having none of the elements of good faith and is defined by statute as a "gambling contract." Fictitious purchases or sales such as were in the contemplation of the parties were as nothing, and it is a matter of no consequences where it is pretended they were made, whether on the board of trade or elsewhere. It would have been quite as well and would have conformed as nearly to the contract of Hooker & Co, had they simply entered upon their books, they had made such purchases or sales on behalf of plaintiff without going upon the board of trade, and claiming they had made such purchases and sales, and on returning made such entries. Betting upon the market could be done just as well in that way as in any other. It needs no illustration to make it apparent, the contract between plaintiff and Hooker & Co., as the trial court must have found it from the evidence, comes exactly within the meaning of section 130 of the criminal code, that declares 'whoever contracts to have or give to himself or another the option to sell or buy at a future time, any grain or other commodity, shall be subject to a fine or imprisonment, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.' It is sure this statute forbids any one to contract, to have or to give to himself, or to contract to give to another the privilege to deal in options. This is precisely what Hooker & Co. did. They contracted to give to the plaintiff the privilege to deal in options and settle with them upon differences as indicated or determined by the fluctuations of the market. This is one of the offences against which the statute is leveled."

I have made this extensive extract because it covers the questions in controversy. The contract is the same as White and Barber made; the purpose was the same; the form of the transactions was the same. The only difference is that in that case Hooker & Co., had paid the losses and Foote had repaid them. The whole transaction was closed up, and the suit was to recover back what had been paid, while in this case before Barber paid over the money, White repudiated the transactions and notified Barber not to pay over the money in his hands, and this suit is to recover it.

It is apparent from all the cases growing out of

transactions on the Chicago Board of Trade that there has been a continued struggle on the part of the gamblers in that body to get the courts to hold that the statute was leveled only against "puts" and "calls" as the court below defined them, and to exclude the operation of the statute from such transactions as were in form contracts to buy or sell for future delivery. The question never seems to have been settled in all its features till the decision in Pearce v. Foote, *supra*. The Illinois courts only followed the current of modern decisions on this question.

North v. Phillips, 89 Pa., 250,
10 Weekly Notes of Cases 109 and 112;
Barnard v. Backhaus, 52 Wis., 593:
Cobb v. Prell, 15 Federal Rep., 774;
Grizwood v. Blane, 11 Com. Bench Rep., 538;
Brua's Appeal, 55 Pa. State, 298;
Kirkpatrick v. Bonsall, 72 Pa. State, 155;
Stewart v. Danner, decided by the Court of Appeals of Maryland, reported in Chicago Legal News of August 22, 1886;
The First National Bank of Lyons v. The Oskaloosa Packing Company, 66 Iowa, 41;
Gregory v. Wattona, 58 Iowa, 711;
Murray v. Ocheltree, 59 Iowa, 435.

For a complete definition of "puts," "calls," "straddles," "options" and "futures," I refer to Dewey on Contracts for future delivery and commercial wagers, pp. 26, 27 and 28.

The author deems all such contracts valid if honestly made and he defines such of them as wagers thus:

"Where the parties to a contract in the form of a sale agree expressly or by implication at the time it is made that the contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference between the contract price and the market price at a given time in the future; such a

transaction is a wager; the form of the sale is a mere cover; the real intention being to bet upon the market price at some future time; the sum wagered being the difference between the two prices as that may subsequently appear."

Upon these authorities I submit, the Court below erred in charging the jury that "puts" and "calls" were the only contracts within the statute against wagers; and it was also error to tell the jury that unless they found the transactions in controversy "puts" and "calls" as described, they should find for the defendant. It appears to be proper to consider two additional questions as follows:

First.—Whether the real matter in issue was not the validity of the contract between White and Barber, and whether the dealings between them, were not wagers.

Second.—If such dealings were wagers, could White recover, under the circumstances the money he advanced to Barber?

FIRST:

I submit that the character of the contracts made on the Board of Trade by the defendant in error, although they were intended for the plaintiff in error were wholly immaterial. There is no testimony in the record that tends to show that the parties dealt with were ever known to White till two of them appeared as witnesses on the trial. There is no testimony tending to show that White ever knew that said contracts differed from what he had authorized Barber to make. There is no testimony tending to show that, in all the dealings for White on the board, amounting to nearly $4,000,000, Barber ever communicated to White the name of a single person contracted with, or a single contract made, or that there was

a bushel of grain, or pound of produce received or delivered. White's intention was to bet on the fluctuations of the market; the terms of the agreement between him and Barber contemplated such betting and nothing more. Barber's authority was to bet for him and nothing more, and White was never notified until long after these deals in controversy were made that White was bound to deliver or receive any property whatever. The testimony affirmatively showed that all the profits and losses previously made and lost were differences and not values. If these contracts were valid contracts they were made without authority, and White never authorized Barber to pay the money in controversy on them.

I submit that White never ratified the sales; that the litigation White was somewhat identified with was to break the force of the board in fixing the settling price or the amount of margins to be paid; that the futile attempt to tender red wheat made by Barber without any protest by White is no ratification or adoption by White of a contract made by Barber in his own name and upon his own responsibility. White had no grain to deliver, never had, and never expected to have, and Barber knew it. The grain did not exist as every one on the board or acquainted with the situation knew. To say that White, by anything he did or said, intended to adopt said contracts with the understanding that they were valid and required the delivery of the wheat is wholly without proof or testimony tending to prove it.

I submit, therefore, that the money was placed by White in Barber's hands to pay out to others on fictitious deals, and if that was the understanding between them the law fixes upon them the consequences and their whole transactions, contracts and negotiations, were void.

White authorized these sales as options or margins, and kept putting up margins in Barber's hands till the latter held nearly $12,000 of White's money. The parties were exactly in the situation covered by the statute. Barber had contracted to give to White the option to sell wheat at a future time. Such are the terms of the statute and such were the terms of their contract.

If it had not been for the statute White would have had the right to sell the wheat at the future time or to collect or pay the difference in price. This right was secured to him by his contract with Barber. But Barber's undertaking was void by the statute, and his contracts with others to effectuate it for White were also void as to White, and gave Barber no lawful authority to part with White's money. It was in this situation that White notified him not to pay it over because he repudiated the whole transaction as he had a right to do. This theory is fully sustained by the Supreme Court of Illinois in Pearce v. Foote, 113 Ill., 228. The transaction of Foote with Hooker & Co., his brokers, has been stated above. It was almost identical with that between the parties here, and the Court held it was a gambling contract, and the note passed to Hooker & Co. in payment for losses incurred by them, could be recovered back. The Court, in passing upon the contract between Foote and his brokers, says:

"Fictitious purchases or sales, such as were in the contemplation of the parties, were as nothing; and it is a matter of no consequence where it is pretended they were made, whether on the Board of Trade or elsewhere. It would have been quite as well, and would have conformed as nearly to the contract of Hooker & Co, had they entered upon their books they had made such purchases or sales on behalf of plaintiff, without going on the Board of Trade and claiming they had made such purchases and sales, and on returning made such entries:

'Betting on the market,' could have been done just as well in that way as in any other. It needs no illustration to make it apparent the contract between plaintiff and Hooker & Co. comes within the meaning of section 130 of the criminal code that declares 'whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity,' etc. It is seen this statute forbids anyone to contract to have or give to himself, or to contract to give to another the privilege to deal in options. That is what Hooker & Co. did. They contracted to give to the plaintiff the privilege to deal in options and settle with them upon differences as indicated or determined by the market. This is one of the offenses against which the statute is leveled."

The case above cited of the First National Bank of Lyons v. The Oskaloosa Packing Company, 66 Iowa, 41, prooceeds upon the same theory. There was no evidence in that case showing that the parties who sold the "ribs" understood that they were not to be delivered, but differences paid. The Court says:

"But we do not deem it necessary to enquire further as to these unknown contractors. This is an action upon a promisory note given to Stiles, Goldy & McMahon, which they claimed was to reimburse them for margins advanced for the defendant. If they knew that this was an illegal and gambling transaction, and understood that it was to be settled without any delivery of the ribs, no recovery can be had upon the note. They stand in no better position than mere stake-holders in a gambling transaction who loan money to one of the gamblers to enable him to make his bet upon the turn of a card, the speed of a horse, or the success of a candidate for office."

The Court then considered the evidence which was confined wholly to the contract between the brokers and the packing company and held it sufficient to show participation on the part of the brokers with "gambling transactions." The case can have no other construction than holding that if the contract with the broker is an employment to deal for his principal in margins it is a gambling contract under which the broker can acquire no right to be reimbursed for his losses. This question

was thoroughly discussed in Flag v. Baldwin, 38 N. J., Eq. 219. It was an action by a stock broker to foreclose a mortgage given to him to cover certain losses in speculations in stocks upon margins. Baldwin, the broker, had received certain sums in cash, and the security sought to be foreclosed to keep good the margins on stocks to be bought and sold for his customers. As in the case at bar, the transactions were conducted in Baldwin's name, and an account of the profits and losses was kept with the Flags. In a suit to foreclose the mortgage it appeared that the broker had lost the sum of $10,-909.50, and the question was whether it could be recovered. It affirmatively appeared that the broker did actually buy and sell the stocks, and the margins of profits and losses were charged to Flag's account. On page 232 the Court says:

"In the able opinion below much stress is laid on the fact that the purchases and sales for this account were actually made by respondent. He so testifies and produces vouchers in corroboration of his statement. That the transactions were very large, and upon a petty advance is not sufficient, probably, to permit us to reject this positive statement. But assuming it to be true that the respondent actually purchased or sold every share of stock in this account, I am unable to perceive how the circumstance affect the conclusion in this case. If respondent was the mere agent of the appellants in transactions with third parties, there might be some significance attached to it. But such is not, as we have seen, the real nature of the relation between the parties. They were dealing, as to this transaction,as principals, and it was a matter of indifference whether the respondent owned or bought the stock he agreed to carry."

The case of Cobb v. Prell, 5 McCreary, 80, is in point. There was no evidence that the contracts the broker made with others were margins, but the case was decided on the testimony that showed that the understanding between the parties was that they should be

deals in margins. If this be the true theory of the case as presented by the testimony in the court below, the charge was clearly erroneous. It put the case to the jury on the character of the contracts Barber had made with the members of the Board of Trade instead of directing the jury that the character and dealings between White and Barber was the main question, and if they were in the nature of wagers, the plaintiff could recover.

SECOND.

I insist that White had the right to recover back the money although it had been advanced to Barber to be invested in gambling contracts.

This suit was instituted on May,18th 1883. On May, 10th 1883, the plaintiff in error served on the defendant the notice to pay over the money to him, the plaintiff, and not to pay it over to any other person, because said sales were illegal and void.

I claim that White had the clear right to recover this money at common law, because it had not been applied or paid over. Upon the theory the Court below tried the case,Barber was a mere stake-holder between White and the parties to whom the sales were made, and White had the right, at any time before it was paid over, to change his purposes and demand the money. Love v. Harvey, 114 Mass., 80, is in point. The money bet was demanded of the stake-holder after the bet was lost, yet he paid it over, and a suit to recover it from the other party to the bet was sustained.

His Hon., Justice Gray, in deciding that case says:

"The defendant having received the money from the stake-holder after notice from the plaintiff not to pay it over, was liable to the plaintiff under the count for money had and received."

At the common law, if White had paid over the money, or Barber had done so by his authority, the law, perhaps, would have left him where he voluntarily placed himself, but his position was, in legal contemplation, both an illegal and immoral one, from which he had the right to withdraw at any time, and to refuse to part with his money.

But section 132 of the criminal code of Illinois which is set out in the following extract from Pearce v. Foote, 113 Ill., 237, expressly gives the right of action.

The following is extracted from the opinion in that case:

"Assuming, then, as must be done, the facts were correctly found by the trial Court, the contract between plaintiff and Hooker & Co., was in law a gambling contract, and hence void, the question arises on the other branch of the case, whether plaintiff, either at common law or under the statute of this State, can recover that which he paid Hooker & Co. as money or property lost in gambling transactions from the defendant in whose hands the specific property is found. As the solution of this question depends upon the construction that is to be given to the statute of this State on this subject, no investigation will be made as to what the common law was in such cases. So much of section 132 of the criminal code as has any application to the point being considered, is as follows: 'Any person who * * * by any wager or bet upon any * * * contingent event loose to any person so * * * betting, any sum of money or other valuable thing, (amounting in the whole to the sum of $10,) and shall pay the same or any part thereof, the person so loosing and paying or delivering the same, shall be at liberty to sue for, and recover, the goods, moneys or other valuable thing so lost and paid or delivered, or any part thereof, or the full value of the same, by an action of * * * trover * * from the winner thereof, with costs in any court of competent jurisdiction.' It is said, if it shall be conceded the contract between plaintiff and Hooker & Co. was a gambling contract within the contemplation of the statute, this provision of section 132 does not apply to, nor does it authorize an action against Hooker & Co. for the simple reason they had not now any money or valuable thing from plaintiff, upon any

gambling transaction; or more tersely stated,the argument is, the note in controversy was not paid upon a bet or gambling transaction to the winner of such bet.

"The position taken can hardly be maintained. The agreement, as the trial court was authorized to find it, is that Hooker & Co. contracted to give plaintiff the privilege to deal in options with or through them, and if there was a loss, plaintiff was to pay it to them, and if there was a gain Hooker & Co. were to pay it to plaintiff, and for their services they were to be paid a commission. The suggestion that Hooker & Co. merely acted as the agents for plaintiff in these unlawfull transactions may be rejected at once as having nothing in its support. There is, and can be, no such thing as agency in the perpetration of crimes or misdemeanors, or, indeed, in the doing of any unlawful act. All persons actievly participating are principals. Treating all parties engaged as principals it is immaterial to which one the money or property lost was, in fact, payed or delivered- whether to Hooker & Co. or to any of the parties on the Board of Traid with whom they may have made ficticious contracts,and lost—and paying to either principal, is in law, paying to the winner. But aside from this view the contract in express terms provides the losses, if any, should be paid to Hooker & Co.,and not to the person with whom they might have had gambling contracts on the Board of Traid or elsewhere, and the money and note was so paid to Hoooker & Co., as the contract provided."

It was held that under this section of the statute a looser in gambling could recover his losses from the winner, and White and Barber were, I insist, exactly in that situation.

The same transactions, the same state of facts, and the same questions of law are involved in the next case on the docket of this Court, No. 351, as have been discussed in the foregoing brief, I shall, therefore, in the brief in that case insert this discussion of the legal questions instead of an additional discussion thereof.

The plaintiff in error respectfully asks the judgment in this case be reversed, by

LINDLEY M. NINDE,
His Attorney.

123-392

Office Supreme Court U. S.
FILED
NOV 15 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

No. 72.

JAMES B. WHITE,
Plaintiff in Error,
vs.
GEO. M. BARBER,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT OF THOMAS DENT, FOR THE DEFENDANT IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

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[The Transcript of Record in No. 73 on this Docket, it being in a Chancery suit, gives *in extenso* all the matters of fact appearing in outline in this transcript, and the two cases should in reality be considered together. One argument applies to both of the cases.]

This is an action of assumpsit which was brought by White, the plaintiff in error, against Barber, the defendant in error. The declaration contains the common counts for money had and received, etc. The case was tried upon the plea of the general issue, and a verdict was found for the defendant. No exceptions were taken on the trial save one to the charge as a whole, and two to special parts thereof. At the close of the charge, which was by Hon. Henry W. Blodgett, a general exception thereto is stated, and later said two parts of the charge, which will be presently noticed, were singled out as matter of exception.

Although the record in the chancery case between the same parties, referred to as No. 73 on this docket, is fuller than the present record, it may be profitable to analyze this record as to the facts involved.

The assignable matters of error are confined to said two special parts of the charge, and practically involve only the question whether the Circuit court stated a proper construction of a statute of Illinois, making it a misdemeanor to make certain contracts, commonly known as "puts," "calls" and "privileges to buy or sell."

So little is really involved as matter to be debated under the exceptions noted, that a very brief handling of the facts would suffice; yet the statement of the same herein may aid in the argument of the appeal in said chancery suit.

The plaintiff, White, here sued his commission merchant, Barber, for moneys which the latter paid out to satisfy damages which arose in execution of orders of the plaintiff.

The case is peculiar in that White, the plaintiff, having engaged the services of the defendant in executing orders for the plaintiff for the making of certain sales of wheat for future delivery, and having recognized the fact that the defendant, in executing such orders on the Board of Trade of the city of Chicago, became liable to pay the moneys in question, amounting to $11,162.50, as damages for non-delivery, in addition to $250 earned commissions, paid the same over to the defendant, to be held by him until the damages should be adjusted, and, on the adjustment of the damages, after much contest as to the true basis of the damages, the defendant having paid over the same to the parties with whom he had made the contracts, in behalf of the plaintiff, the latter afterwards

brought this suit to recover back these moneys from his agent, the defendant, who had so paid them over. It is a case of a principal suing his agent, after the agent has fully and fairly executed the orders given him, and after the agent has paid over the moneys which the plaintiff put in his hands for the purpose of satisfying damages for the non-fulfillment by the plaintiff himself of the contracts made in his behalf by the agent.

Suits have heretofore been brought by the brokers or agents in such cases for moneys which they have been required to advance for their principals on board of trade contracts. Such a case was *Roundtree* v. *Smith*, 108 U. S., 269. That case presented some features like the present, but differed from the present in that Messrs. Smith & Lightner, the plaintiffs in that case, having in the course of their employment by Roundtree, as his commission merchants, paid out moneys on Board of Trade contracts, sued to recover them back, together with their commissions. But here the plaintiff, White, sues his commission merchant to get back moneys which the latter necessarily paid out in executing such contracts for him; and the case is so novel that no fair precedent for it can be found.

In *Williar* v. *Irwin*, 11 Bissell, 57; S. C., 110 U. S., 449, the commission merchants, Williar & Williar, brought an action against their principals for the balance alleged to be due for advances made in carrying out certain contracts for future delivery of grain, which contracts were made upon the orders of Davis, apparently in behalf of his firm, Irwin & Davis. That, again, unlike this case, was where the principal had not paid over the moneys to the broker or commission merchant, but was called upon to do so. It was therefore the reverse of the present case.

Here the verdict and judgment of the court below can be thoroughly supported upon the ground already suggested, of a want of authority on the part of the principal to recover back moneys paid over, first by the principal, and secondly by the agent or commission merchant, in settlement upon contracts made by the plaintiff's orders. Thorough support of both the verdict and judgment will also be found in the fact that the special contracts which are now questioned by the plaintiff, are, by his own testimony, fairly considered, shown to have been legal and binding contracts, so that he was as much disentitled to ask any instruction tending to draw in question their legality as was Mr. Roundtree in *Roundtree* v. *Smith*, *supra*.

The record itself, however, comes into a narrow compass for examination in this court; for it in substance presents only the question, whether the trial court committed error in construing an Illinois statute, which is quoted in the record (printed Rec., 27): "Whoever contracts to "have or give himself or another the option to sell or buy, "at a future time, any grain, or other commodity, shall "be fined, etc.; and all contracts made in violation of this "section shall be considered gambling contracts, and "shall be void." This is a provision of the Criminal Code of Illinois, Revised Statutes of Illinois, chapter 38, section 178, (1 Starr & Curtis, 791). The statute should receive a strict construction. The construction actually put upon it by the court was the same as that announced by the Supreme court of Illinois in *Wolcott* v. *Heath*, 78 Ill., 436–7, from the Opinion in which case Judge Blodgett quoted. That construction has always been maintained, even down to the latest rulings in the Illinois courts, as for example, in *Miller* v. *Bensley*, 20 Bradwell,

(Appellate court of Illinois), 528. It is in accordance with the rulings of the various courts concerning Board of Trade contracts.

8 Myers' Federal Decisions, 315, 321.

Later on, some recurrence may be made to these legal positions, and a more special examination will also be made of the nature of the objection to the charge of the trial court, and also to another possible aspect of the case, to wit: the question whether, even if the contracts under consideration had been in the nature of a wager, as is most confidently denied, the plaintiff could have a right when he gave the notice of April 2, 1883, to declare the wager off, and put his agent in the breach, requiring him to refund the moneys paid to him for his indemnity, when through the plaintiff's own act, such agent had been placed in the predicament of being required to pay the moneys over on account of a settled and legal adjustment of the damages.

A fuller statement of the facts will bring these matters into more distinct prominence, so that in looking at the case from front and rear, it will be seen to be as thin as air.

The Facts as Presented by Plaintiff's Testimony.

The controversy between the parties has reference to a claim on the part of White, the plaintiff, to be refunded certain moneys which were advanced by him to the defendant on account of damages which were found due under the decision of a committee of the Board of Trade of the city of Chicago, for non-delivery under certain sales of wheat made by the defendant for the plaintiff for deliv-

ery in July, 1882. That is to say, James B. White, the plaintiff, gave direction to George M. Barber, the defendant, to sell for said White for delivery in July, 1882, at the seller's option, certain quantities of wheat, aggregating 100,000 bushels. White, the plaintiff in error, says in regard to these sales that in April he commenced selling wheat for July delivery, and, by the last of May, had sold through defendant 100,000 bushels for delivery, this being on the contracts in question in this case. (Printed Rec., 11.) That there was a corner in July wheat, and that the price was forced up ten or twelve cents. That on the last of July he came to Chicago and had an interview with defendant in the morning. That defendant proposed to make a tender of No. 2 red winter wheat, the kind sold being No. 2 spring wheat; that No. 2 red winter was intrinsically more valuable than No. 2 spring, but that on the last of July the former stood at ninety-eight cents per bushel and the latter at $1.35 to $1.37; that he, the plaintiff, knew of the tender and did not object, etc. (*Ib.*) He goes on to state that he met defendant later in the day and was informed by him that the tender had been made of No. 2 red winter wheat. The sales being in 10,000 bushel lots, the tender had been made by offering a warehouse receipt to each of the several purchasers for that amount of No. 2 red winter wheat. That such tender was in every case declined, etc. (*Ib.*) These contracts were made on the Board of Trade of the city of Chicago. The plaintiff then testified that the tender was made under a rule of the Board of Trade, as follows:

" On contracts for grain for future delivery the tender " of a higher grade of the same kind of grain as the one " contracted for shall be deemed sufficient, provided the

" higher grade of grain shall not be of a color or quantity " that will depreciate the value of the other if mixed." (*Ib.*)

A certain statement of account rendered by the defendant, dated October 30, 1882, was introduced in evidence by the plaintiff. It shows that the sum of $11,412.50 was placed in the hands of the defendant by the plaintiff as the difference between the price at which said 100,000 bushels of wheat was sold and the settling price of the same as fixed by the Board of Trade. At the foot of the memorandam of account this statement was made by the defendant to the plaintiff: " I have 100 M " July spring wheat sold for you at the settling price of " same as fixed by Board of Trade (1.35), including " coms. $\frac{1}{4}$c." (Printed Rec., 12.)

The plaintiff further testified, that on the 2d of April, 1883, he served upon the defendant a notice referring to said statement of account, and stating that the plaintiff claimed that all contracts for the sale of the wheat were illegal and void, and that he forbade the defendant to pay over any part of the money or balance, and further demanded the immediate payment thereof to himself. (Printed Rec., 12, 13.)

The plaintiff in his testimony said that defendant complied with his orders; that he didn't think defendant had anything to do with the corner; that after the committee of the Board of Trade had fixed the settling price of wheat under the contracts in question at $1.35 a bill in chancery was filed to contest the matter, and the matter was contested, and that the Supreme court upheld the action of the committee in fixing the settling price. (Printed Rec., 13.)

The plaintiff further testified, that he left it for the defendant, Barber, to put the contracts in form in buying and selling, and understood that Barber would go on the Board of Trade and either buy or sell, and that he did go on the Board of Trade and buy and sell according to plaintiff's orders. That when the contracts for delivery of July wheat were about maturing there was talk about buying wheat at Milwaukee or elsewhere to fulfill the contracts, etc. (*Ib.*)

He also testified that he knew that if Barber, being a member of the Board of Trade, made such contracts for the plaintiff, Barber would be obliged to observe the rules of the Board, one of which rules required that margins should be kept good. He also testified that after Barber made the tender of red winter wheat, which was on July 31, 1882, he, the plaintiff, approved of what Barber had done, and went to see A. M. Wright, who was one of the parties proposing to file a bill to question the propriety or binding force of the finding of a committee of the Board of Trade fixing the settling price for July wheat. That having seen a communication in a newspaper or an interview with a reporter in regard to the corner, he, the plaintiff, went to see Mr. Wright and consulted with him about the matter; that it was complained that the price of July wheat was put too high by the committee, and that it was believed by Mr. Wright and by the plaintiff also that the tender aforesaid was a legal tender or a good tender, and plaintiff went to see John E. Burke, Esq., the lawyer who had the charge of the contested cases having reference to such contracts where damages were claimed for non-delivery of July wheat; that there were thirty-two members of the Board concerned in such cases, and Mr. Barber, in behalf of the plaintiff, joined in with them, and

that he, the plaintiff, footed the lawyer's bill; that when it came to pay for the expense of those legal proceedings the bills were presented to Mr. Barber and Mr. Maltman (the latter being the plaintiff's agent), and plaintiff told him to pay them and plaintiff would refund, and he did so. That it was understood that Mr. Barber was plaintiff's broker or commission merchant, and that when he returned to Chicago (he being, as elsewhere appears, absent at the time), he would join in with the others to contest this matter. The plaintiff knew how the matter progressed after that. He admitted that it was contested in the courts; that a *pro forma* decision was obtained in one of the courts, and that the case was then taken to the Supreme court of Illinois. That this proceeding in chancery was begun after the committee of the Board of Trade, under the rules of the Board, had been so appointed. (It would have been more correct to have said after the committee had made its award.) That the matter was determined about January, 1883, before the plaintiff served the notice aforesaid on the defendant.

The plaintiff called the defendant as a witness, and he testified that after the notice aforesaid of April 2, 1883, was served on him, he paid over to the various parties to whom he had owed the wheat in question the sum of $11,412.50, less the amount of his commissions, which were $250, and that such payment was made because charges had been preferred against him and he had to pay or be suspended from membership in the Board of Trade. (Printed Rec., 15.)

The foregoing is substantially all the testimony offered on the part of the plaintiff, relating to the particular contracts which are to be considered in this case.

Some Conclusions of Fact and of Law on the Plaintiff's Evidence.

It will be seen from the foregoing statement of the plaintiff's testimony that it fully negatives the theory that the contracts for the sale of the 100,000 bushels of wheat were gambling contracts. By that term would be implied that the contracts did not represent real sales. But this evidence shows, and the plaintiff admits, that these contracts were made by the defendant on the Board of Trade in pursuance of the plaintiff's orders, and being made under and in pursuance of the rules of the Board of Trade, the idea that they were "puts," "calls," or "privileges," is negatived; and we find that the plaintiff was persistent in the claim of a right on his part, or rather on the part of Mr. Barber, in whose name the contracts were made, to deliver the wheat. Such persistence is shown in this that the plaintiff favored the making of a tender of the wheat on the 31st of July, 1882, the date at which the contracts matured, and afterwards by the bill in chancery insisted that the tenders which were made by Barber for the purpose of performing the contracts, were good. Then, again, this evidence of the plaintiff shows that he objected, not that the contracts were invalid, but that the decision or award of the committee of the Board of Trade determining the price of wheat for July delivery was questionable or objectionable (printed Rec., 14; original transcript, 30), and that the plaintiff caused proceedings in chancery to be instituted by Mr. Barber to maintain the position so taken by the plaintiff, to wit: that the tender was good, and that the price fixed by the committee was not a fair price. (Printed Rec., 14.) It will be further

observed that plaintiff paid into the hands of Barber an amount precisely sufficient to meet the difference between the contract price and the award of said committee, which amount was held by Barber in pursuance of the plaintiff's desire until after the proceedings in chancery had been determined adversely to the plaintiff's theory, and until April, 1883, when the money was paid over by defendant, Barber, to satisfy the damages according to the award of the committee, it being necessary for Barber to pay over such moneys at that time, to avoid being suspended under the rules of the Board of Trade, such suspension being then imminent. Some of these points will more clearly appear from the statement of the defendant's evidence. But they may be gathered in outline from the epitome of the plaintiff's evidence given in the record.

The question may arise, what application to the actual case before us has the evidence of the plaintiff in regard to *other dealings or contracts by the defendant in which the plaintiff was interested?* It will be said on behalf of the plaintiff that his evidence in regard to his dealings *in general* upon the Board of Trade tends to show that he did not expect either to receive or to deliver any property under contracts made by his direction, but to have the business so managed that Barber, the agent, accounting perhaps to Maltman, but really acting for the plaintiff (see account in printed record, 12), "would deal only "with responsible parties, and the deals should be settled, "so as to get the profits or losses." (P. Rec., 10.) But it appears from the plaintiff's own testimony that as to the wheat sold for July delivery, his testimony in regard to the dealings in general is not applicable. It is inconsistent with his expressed desire to have wheat tendered under said July contracts. It is inconsistent

with his approval of the tender. It is inconsistent with the proceedings instituted in his behalf after the tender was made.

Consideration of the Defendant's Evidence.

The same view is also strongly enforced when we turn to the evidence on the part of the defendant, from which we may gain a somewhat fuller outline of the facts bearing upon the contracts for the July wheat, and may also observe the proceedings had with reference to those contracts.

The defendant testified that he was employed by a Mr. Maltman to trade for the plaintiff on the Board of Trade, to make trades there; that in executing the orders of the plaintiff, he dealt with other members of the Board; that in making the sales of the 100,000 bushels of No. 2 spring wheat, the contracts for which sales were for delivery at seller's option during July, 1882 (these being the deals under consideration), he had no different agreement with any of the persons than what was expressed in the contracts; that the grain was to be delivered or received, and that witness expected it would be delivered. (P. Rec., 15, 16, 17.) He testified that when Mr. Maltman, for the plaintiff, gave him a draft for $5,000, June 12, 1882, which was on account of margins as to these 100,000 bushels of wheat, he, the defendant, was required to *give his word* that he would not buy in the wheat unless by the plaintiff's orders, and would allow the contracts to run to the end of the time; and that he was told by Maltman that White said he would settle, meaning that he would let the proper committee of the Board of Trade fix the price, and he would settle that way, if possible, if he did not decide to buy in

the wheat. A telegram from the plaintiff to the defendant was read, dated Fort Wayne, August 5, 1882, as follows: "Don't cancel the July trades. My attorneys "here believe the tender we made is good and can be "enforced. J. B. White." The defendant further testified that there were about thirty other brokers who made default; that a committee was appointed in accordance with the rules of the Board of Trade; that the committee fixed the settling price at $1.35; that thereupon the brokers (meaning the thirty), filed bills in court to enjoin the Board from suspending them for not settling at the price fixed by the committee; that witness was then absent, but afterwards returned to the city, to wit: about September 10, 1882, and was informed by Maltman that the plaintiff had made arrangements for him to join in the injunction proceedings; that he went the next day to the office of J. E. Burke, the attorney for the defaulting brokers, and signed and swore to a bill in chancery for the purpose above stated, which bill was filed; that afterwards the Supreme Court rendered a decision adverse to the prayer of the bill, and the bill was dismissed; that the plaintiff was informed of the result and paid the attorneys' fees and damage in the case, and that plaintiff did not suggest the making of any further contest.

Thomas W. Burns and Abel H. Bliss, with whom two of the contracts for the sale of the wheat were made by the defendant, were examined. The contracts with them covered 15,000 bushels, part of the 100,000 bushels sold as aforesaid. These gentlemen testified that the contracts were made in the regular way, and without any secret understanding or agreement, relieving from delivery or anticipating that they were to be settled, but that the wheat was to be delivered at any time in July, at the

seller's option. It was at this stage of the case admitted that the other brokers, to whom the defendant had the wheat in question sold, would testify in a similar way as to the contracts with them respectively; hence any necessity for calling such other brokers in support of the view that the contracts were actual and *bona fide* contracts, was obviated.

Alexander S. Maltman testified that he acted as agent for the plaintiff's transactions with the defendant, and that he never told the defendant that the transactions were to be of a gambling or fictitious character; and that his instructions from the plaintiff were for the most part in telegrams and letters, which he gave to or showed to the defendant. Speaking more particularly of the contracts under consideration, they being the contracts for delivery of wheat in July, 1882, this witness testified that in July, 1882, he had several conversations with the plaintiff as to the defendant defaulting (that is, failing to deliver under those contracts); that when the price was up in the thirties (meaning above $1.30 per bushel), the plaintiff was unwilling to advance more margins unless the defendant would agree to default, and that this witness procured such an agreement from the defendant, at the request of the plaintiff. Also, that after default had been made, the plaintiff said he was willing to leave it with the committee to be appointed by the Board (meaning the Board of Trade); that witness went with plaintiff to the office of Mr. Burke, the attorney; that the plaintiff went there to get out an injunction to prevent the Board of Trade from suspending the defendant, and that the witness paid out for the plaintiff on account of those proceedings $285.50, which the plaintiff had repaid him.

George W. Morcom testified that he heard the plaintiff

say that the tender of No. 2 red winter wheat was good, and that, according to their own rules (that is, rules of the Board of Trade), they (the purchasers) were bound to accept such tender. The same witness testified that plaintiff said that he desired Mr. Barber to default on the deals (that is to say, not deliver the wheat), and that he should let the matter go to the committee, and let them fix the price. Also, that the plaintiff would see that Barber was protected.

Deville C. Bannister testified that the plaintiff, at the time the injunctions were being obtained, went to Mr. Burke's office to see about the matter, and said he wished he could take the matter into his own hands. The witness also testified that Mr. Barber did not pay over the money (the damages required to be paid by him under the contracts), until it was necessary to do so in order to save himself from being suspended from the board of trade.

The proceedings in the Illinois courts CONCLUDE THE PLAINTIFF *on the question of the legality of the contracts.*

A notice, by way of synopsis, of the bill in chancery aforesaid, which was filed with reference to those contracts.

On said bill an injunction was procured to restrain the Board of Trade from suspending or expelling the defendant, and also to restrain the said Board from accepting or recognizing the decision of the aforesaid committee, as having any force or effect; which injunction was ordered September 11, 1888, and was dissolved October 11, 1888. The record shows, however, that a stipulation was, at the latter date, made in the case, that the cause was to abide the final result of the case of *Abner M. Wright et al.* v. *The Board of*

Trade of the City of Chicago, in the Appellate court or in the Supreme court, and that in case of a reversal of the decree in that case, then the decree in the Barber case was to be set aside on his motion. On the making of this stipulation, the injunction in favor of Barber was continued or revived. The stipulation further shows that the decree in the Barber case was to be regarded as final, in case the decree in the Wright case should be affirmed, except that in such case the injunction was to be dissolved on motion of the Board of Trade. It further appears that on the 16th of April, 1883, the Superior court of Cook county, in which such injunction was so obtained and so revived, vacated the order which had revived the injunction; and thereupon the bill stood dismissed under the previous order of the court. This was because the Supreme court had, in the case of Wright, affirmed the decree of the Superior court, dismissing his bill. (For the opinion of the Supreme court of Illinois in that matter, see *Wright* v. *The Board of Trade of the City of Chicago*, 15th Chicago Legal News, 239.)

We may look further at the synopsis of the bill to learn whether it referred to these contracts as being tainted with any illegality, or as being in any way fictitious. What do we find the bill to say about this? Nothing having a tendency to impeach the contracts. It refers to the contracts so made by the defendant for delivering the wheat in July, 1882, but only to allege that there arose an unlawful combination to prevent the plaintiff and others situated like him from fulfilling their contracts (meaning that a corner arose as to this grade of wheat for July delivery). The bill, as a parry against giving effect to corner-prices, set forth a certain rule of the Board of Trade, providing for the appointment of a committee to deter-

mine disputes as to the price of property in case of excessive claims for damages being made under contracts on default; and averred that an application for the appointment of such committee was made with reference to the defaults upon contracts for delivery of No. 2 spring wheat in July, 1882, and that the committee determined the price for settlement at $1.35 per bushel. The bill then questioned the decision of the committee upon various grounds, not, however, drawing in question the validity of the contracts. (Printed record, 18.) But the bill questioned whether the Board of Trade had power to compel its members to abide the decision of such committee, and also questioned the regularity of the appointment of the committee, and charged that in the conduct of the hearing before the committee, and in the finding of the committee, the spirit of the rules of the Board of Trade was violated by putting it in the power of persons who had been concerned in cornering the market to get excessive damages, etc. The bill pointed out certain rules of the Board of Trade, under which, in case any member failed to comply promptly with the terms of any business contract or obligation, or failed to satisfy, adjust and settle the contract, or failed to comply with or fulfill any award of the committee of arbitration or committee of appeals, made in conformity with the rules, regulations and by-laws of the association (Board of Trade), he should, upon admission or proof of the delinquency before the board of directors be subject to be suspended from all privileges of the association, etc. (this being the rule under which Barber was liable to be suspended or expelled unless the injunction should issue). (Printed record, 18, 19.)

It appeared from the testimony that the plaintiff paid

the damages which were assessed against the defendant on account of the issuing of the injunction.

It further appeared that at the time of the delivery by the defendant to the plaintiff of the aforesaid statement of account, dated October 30, 1882, the balance of $11,-412.50 therein mentioned, being the difference between the price at which the 100,000 bushels of wheat was sold, and $1.35 per bushel (which was the settling price fixed by the committee), was to remain with the defendant to await the action of the court upon the said bill in equity, seeking to impeach the decision of said committee, and that after the matter had been litigated in the courts through the said suit in favor of Wright, which was made the test case, complaints were made before the Board of Directors against the defendant on account of default on his part in performing or settling the contracts for the sale of said 100,000 bushels of wheat; that notice of one or more of such complaints was given by the defendant to the plaintiff; that the defendant appeared before the board of directors to make defense, but did not succeed in defending, and that being about to be suspended unless he settled, he did thereupon settle by paying the balance due for damages, according to the decision of the committee declaring $1.35 per bushel to be the settling price, so that the moneys paid out by the defendant, together with his commissions, exhausted said sum of $11,412.50. It appeared in evidence that this was prior to the commencement of this suit, but after the aforesaid notice of April 2, 1883, so given by the plaintiff to the defendant (printed record, 19, 20; and as to the notice, see again page 12 of the printed record.)

The testimony tended to show that this money was left in defendant's hands by the plaintiff when the aforesaid

statement of account was given by the defendant to the plaintiff, and was so left for the protection of the defendant, pending the litigation questioning the decision of the committee in regard to the settling price. (Printed record, 20.)

It appeared that after the decision of the Wright case, inquiry was made of the plaintiff as to whether he wished anything further done in reference to the prosecution of the chancery suit in the name of Barber, and that he replied, "Further appearance not necessary."

Certain inferences from the foregoing statement of the case may be deduced. The plaintiff did in the most effectual manner possible estop himself from claiming that the contracts under consideration were invalid. If he had thought them invalid for any such reason as he now intimates, the time for him to speak out was on or before the day they matured. On that day, to wit: July 31, 1882, he affirmed their validity, and sanctioned or advised a tender by Barber to meet the contracts. That tender he thereafter, from time to time reaffirmed. Witness his telegram of August 5, 1882. (Printed record, 16.) Then there was opportunity for him to suggest the invalidity of the contracts when preparations were made for the filing of a bill in chancery. But even then he did not hint that there was any such invalidity; and the bill was directed merely to the question whether the settling price fixed by the committee was a just or fair price. Indeed, the plaintiff had desired that such a committee should be appointed, and that it would determine the fair market value of No. 2 spring wheat on the 31st of July, 1882. We may conjecture that the plaintiff, when expressing his desire to have the committee appointed, hoped that such a price should be fixed, as would let him

out with some money; yet, at the same time, he undoubtedly anticipated that it was possible the committee might fix some price which would require the payment of some money by Barber for him, unless the tender was held to be good. Accordingly, between the filing of the bill in chancery and the decision of the Wright case in the Supreme court of Illinois, the plaintiff reduced his account with the defendant to the very sum which would enable the defendant to meet the award of the committee, in case the decision in the Wright case should be adverse to him; and no breath of suspicion of objection by the plaintiff to the validity of the contract appears until some months after that decision was made.

The plaintiff was precluded in equity and at law from reclaiming the moneys so deposited by him with the defendant. The latter was authorized to pay them over.

As to the Charge of the Court.

Judge Blodgett's charge states the case quite clearly. It summarizes some of the facts to which attention has already been called, and besides presents aptly the theory of the plaintiff that the dealings, on account of which the defendant paid out these moneys, were illegal, gambling, or wager contracts. It put the question to the jury whether in the light of the testimony in the case, the contracts in question were contracts to buy or sell at a future day, or whether they were simply absolute sales in which the seller had the entire month, the month specified, in which to perform the contracts. It stated that it was the duty of the court and jury to look into the testimony, and into the transaction itself, in the light of the proof, and determine whether the dealings of the plain-

tiff on the Board of Trade, through the defendant's agency were such transactions as are prohibited by the statute, or were gambling transactions, (Printed Rec., 21, 22). The jury were charged that if they found that the dealings by the defendant for the plaintiff were gambling contracts, that is, if they were options to buy or sell at a future day, then the defendant was liable for the amount claimed and the verdict should be for the plaintiff; but if on the contrary, the jury found from the proof that the dealings conducted for the plaintiff by the defendant were contracts by which the grain was to be absolutely delivered during the month of July, the only option being the time when, during the month, the delivery should be made, then the defendant was not liable, and the verdict should be for the defendant.

Conclusions as to the Charge.

Does it not appear to an indifferent observer that the charge was highly favorable to the plaintiff, and, indeed, more favorable to him then he could have expected under the testimony? In order to secure a charge thus favorable, it was necessary to conclude that the plaintiff had a right to revoke his action in advising the tender of wheat to fulfill these contracts, and also had a right to revoke his assent, expressed or implied, to the appointment of the committee under the rules of the Board of Trade, to determine what was a fair price for the wheat on the 31st of July, 1882, and also had the further right to recall his connection with the suit in chancery, in which the validity of the contracts was clearly recognized, and likewise had the right to ignore the fact that he had placed the defendant in a position in which, as matters stood on the

giving of the notice of April 2, 1883, the defendant was not at liberty to refuse payment of the damages, but was in danger of being expelled from the Board of Trade if he persisted in such refusal. The plaintiff was not, however, entitled to ignore any of these things. He had been instrumental, actively instrumental, in affirming the validity of the contracts, and could not conscientiously ask, under such circumstances, that he should go "scot free," and that these damages should be paid by the defendant.

It may be remarked by plaintiff's counsel in this connection, that the plaintiff's own testimony in respect to the dealings in general, and more especially in regard to those dealings *other than in the case of the contracts under consideration*, tended to show that he, being a merchant in Fort Wayne, Indiana, did not want it known that he was speculating on the Board of Trade of Chicago, as it might affect his credit, but desired that the accounts should be kept by the defendant in the name of A. S. Maltman; that he considered it a hazardous business, but was willing to gamble, provided he could have a fair show; that he wanted his deals placed with responsible parties, so that he could get his money when he made it; that he did not want any of the property, but meant simply to do a gambling businesss, and that he desired that the deal should be settled so as to get the profits or losses. But in the same connection, it is to be noted, in addition to what has been formerly stated herein as to the contracts under consideration, that the plaintiff admitted that all the deals for him were in form contracts for future delivery, in which the seller had the option of delivering at any time during some future month, and that prior to April, 1882, all trades made by the defendant for him, the plaintiff, had been settled or closed by counter trades prior to the

month in which the delivery could be made. If, then, the strong evidence on the part of the plaintiff himself as to the legality and binding effect of the contracts for the sale of wheat for delivery in July, 1882, could be countervailed or explained away by evidence touching prior dealings; yet even those prior dealings do not seem to have been illegal, for they comprised contracts which provided for the delivery of the grain at a future time; and if the plaintiff's theory is true, that they were settled or closed by countertrades prior to the time for delivery, this is consistent with the legality of the contracts. Whatever may have been the defendant's general course of dealing *for himself*, yet he was required to make, and in carrying out plaintiff's orders did make, binding contracts, which were not merely contracts for margins or differences, but against which he was obliged to guard by countertrades unless settlement was made before the time for delivery. (Printed record, 11.)

The fact that counter trades were necessary, as the plaintiff admits, would show the whole series of contracts, not only those under consideration, but the prior ones, to be legal; for where a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

U. S. v. *Cent. Pac. R. R. Co.*, 118 U. S., 235.

The legality of the contracts was to be presumed. The burden of proving their illegality was on the plaintiff, and even his own evidence did not impeach the contracts under consideration.

The instructions of the plaintiff to the defendant would have required the defendant to make valid contracts.

Such contracts would be made on the Board of Trade, and of course would be subject to the rules and regulations of that Board; and, as stated in the charge of the court, the contracts as made were binding between members of the Board of Trade. And, as is also mentioned in the charge of the court the Board of Trade does not allow or recognize "puts" and "calls" or trades which are purely optional with the parties for future delivery (P. Rec., 23), from which fact it would follow that the plaintiff's orders to the defendant did not permit the defendant to enter into any such invalid transactions.

To this part of the charge no special exception seems to have been taken.

In saying that the plaintiff required the defendant to make valid trades or contracts, it will be understood that his language to Mr. Maltman, who was his immediate adviser, and by whom his orders were made known to the defendant (P. Rec., 10), is to be interpreted by referring to what was actually done under his direction. What was actually done appears in his statement: "That all the deals made were in form contracts for fu- "ture delivery at any time during some future month." (P. Rec., 11.) Then he said that up to April, 1882, all trades "had been settled or closed by counter-trades." (P. Rec., 11.) And again his language, whether used to Mr. Maltman, his immediate agent, or to defendant Barber, is subject to explicit explanation, so far as the trades under consideration are concerned, by the various facts above detailed, showing that he encouraged and advised a tender of the wheat under these contracts, etc.

GENERAL CONCLUSIONS, WITH OBSERVATIONS AS TO VARIOUS POINTS OF LAW APPLICABLE.

(*A.*) *The contracts were valid.*

The case shows, and the jury found, that as to the contracts now in consideration, they were made by the defendant for the plaintiff on the Board of Trade, and that the defendant was liable to either deliver the grain or pay the damages in case he failed to deliver. Whether this was so was clearly left to be found by the jury. (Printed Rec., 24.) Indeed, no other conclusion than that the contracts were valid was possible. (Greenhood on Public Policy, 234, 237.) The various acts of the defendant, and his instructions concerning the tender, etc., etc., left no alternative as an answer to the question whether the contracts were for the actual delivery of grain. Nor was there any evidence tending to show that both parties, or for that matter any of the parties to the contracts, intended them to be wagering contracts, or puts or calls or dealings merely for margins and differences. The test of illegality is not merely the intention of one of the parties, but of all the parties to the contracts, or rather of the commission merchant and those with whom he dealt. (*Kirkpatrick* v. *Adams*, 20 Fed. Rep., 287.) The rule in such cases is, that to make a contract void as a mere wager upon the market, it must appear that *neither party* intended a delivery of the goods contracted for.

Lehmann v. *Strassberger*, 2 Woods, 554.
Gregory v. *Wendell*, 40 Mich., 432.
Williar v. *Irwin*, 11 Bissell, 57; S. C., 110 U. S., 499, 508,

accepting the view of the Circuit court so far as this point is concerned.

Clarke v. *Foss*, 7 Bissell, 540.

The defendant, Barber, having made lawful contracts, the plaintiff is not entitled to recover back money paid to indemnify the defendant, even though the plaintiff may have intended originally to bet on the market.

Kent v. *Miltenberger*, 16 Cent. L. J., 433;
S. C., 13 Mo. App., 533.

as to the principle involved.

The natural conclusion would seem to be this, that the evidence on the part of the plaintiff distinctly presents the case of certain contracts, which, according to any standard that has ever been set up, were legal contracts. They were contracts under which delivery was required by law. Such delivery was in some form tendered by direction or with the approval of the plaintiff. Thereafter the question remained to be decided whether the tender was good, or if not good, how much damages should be paid by Barber, the defendant, who necessarily stood in the breach, because the contracts were made in his name with other grain dealers, toward whom, therefore, he was the principal, with the right, however, to ask indemnity from the plaintiff, who had induced him to make such contracts. Those contracts are so segregated from other dealings in which the plaintiff was interested, and toward which his evidence was directed to show that he was not dealing for grain, but was merely speculating, that under the evidence actually treating of such contracts he was not entitled, on his own showing, to have the question put to the jury as to whether the particular contracts under consideration were wager con-

tracts or not, nor did he ask the court to instruct the jury in any other way than that adopted by the court. He is in no position to complain.

It should be borne in mind that the contracts, on account of which the plaintiff left indemnity money with the defendant, were contracts which at that time the plaintiff claimed, according to his own testimony, to be contracts under which he was entitled to deliver the grain. Also that at the time the indemnity money was left with the defendant the plaintiff was contesting the question whether the committee of the Board of Trade had fixed a fair price for the wheat in case the tender of the same should not be held to be availing under the rules of the Board of Trade. He was thus contesting through the Wright case, which was made a test case, but which did not question the validity of the contracts. The case presented for our consideration is, therefore, one in which the defendant, having been required to pay over to third parties the money so left with him by the plaintiff, must now repay it to the plaintiff. It would be a remarkably hard case to require such payment, and it will be impossible to support the plea of the plaintiff.

If he had not paid over this indemnity money to the defendant, and the latter had brought an action for the recovery of the same, the action could most certainly be supported upon certain broad facts presented in the evidence on the part of the plaintiff, namely, upon the fact that the contracts were regular Board of Trade contracts, under which future delivery was provided for, which delivery the plaintiff time and time again asserted was proper to be made, and was actually tendered. Those facts, along with the repeated assertion by the chancery proceedings of the rights of the plaintiff under these con-

tracts, would have given the defendant a clear right of action for these moneys if they had not been paid over by the plaintiff. But when we look at the case as it is actually now presented, and find that the plaintiff in view of all that occurred prior to October 30, 1882, three months after the maturity of these contracts, admitted the right of the defendant to indemnity, in respect to the damages which he was likely to suffer from having made the contracts for the plaintiff; and when we further consider that the defendant afterwards actually paid out the moneys to meet those damages, any right on the part of the plaintiff to question the contracts cannot be maintained. If the plaintiff had not paid over these moneys at all, and the defendant had brought suit therefor, after paying the same to third parties, the evidence on the part of the plaintiff in this regard would have brought the case within Rule CCXVII, stated in Greenhood's Public Policy, 234, and would have allowed such recovery by the defendant from the plaintiff.

The same conclusion is reached under Rule V., in Dewey on Contracts for Future Delivery, etc., 324: "Where the relation of principal and agent is clearly "shown, and the latter guarantees a market to the for- "mer, and agrees that he will so conduct and arrange "his principal's business that the latter will not have to "make or receive delivery of the articles bought or sold, "the agent can recover his commissions and losses paid." That rule would be fairly applicable to the plaintiff's testimony, considered by itself, as to dealings by the defendant, other than under the contracts not now specially or directly involved; but, applying the facts developed by the evidence on the part of the plaintiff about the contracts for the wheat to be delivered in July, 1882, there

could be no doubt the defendant would have a right to recover this indemnity money if he had paid it out without first receiving it from the plaintiff.

(B.) *The assignments of error noticed.*

But, to come more particularly to the errors assigned, we have to say that the first, second, third and fourth assignments do not seem to require attention, although we have already argued them in substance in stating the case. As to the motion for a new trial, and exceptions to the judgment and to the charge as a whole not being debatable under such assignments, see Phillips Pr. (Sup. C. U. S.), 83, 209.

The fifth and sixth assignments of error are the only ones that seem to call for notice.

The fifth assignment of error sets out a part of the charge of Judge Blodgett, in which he stated the question to be whether the contracts under consideration were gambling contracts within the meaning of the law, and read to the jury a section of chapter 38 of Revised Statutes of Illinois, it being the section declaring what shall be considered gambling contracts, and also read from *Wolcott* v. *Heath*, 78 Ill., 436, 437, a part of the opinion of the Supreme court of Illinois in that case as to what the statute intended to prohibit; the opinion defining the meaning of puts and calls, or fictitious gambling transactions. The assignment of errors in this case refers to Judge Blodgett's quotation in said case as being a quotation from a decision by this court. It will be seen, on looking at *Wolcott* v. *Heath*, *supra*, that the quotation was from that case. After making this quotation, Judge Blodgett stated the question to be whether these contracts

were gambling contracts, that is, mere puts and calls, or privileges.

The only question arising here seems to be whether the construction of the statute was a fair construction, or, perhaps, more strictly, the question is whether, when the plaintiff did not ask for any different construction of the statute, he can complain of the construction as given, favoring him very much as far as it goes, while his complaint is that it did not go quite far enough. It will hardly be contended that the construction as given was incorrect. The Illinois cases, including the one from which Judge Blodgett quoted, sustain that construction. It is the same construction which was stated in *Tenney* v. *Foote*, 4 Bradwell's Reports, 599, in an opinion which was formally approved by the Supreme court of Illinois in the same case reported in 95 Illinois, 99.

The construction of the statute was fair.

The contention of the plaintiff must therefore be that something more ought to have been said. This is equivalent to saying that a further prayer might have been made by the plaintiff, and in such case, might have been given by the court. But we understand that it is no ground for assigning error, that the court below omitted to give directions to the jury where they were not requested.

Pennock v. *Dialogue*, 2 Peters, 16.

Mr. Justice STORY there said: "The court cannot be "presumed to do more, in ordinary cases, than to express "its opinion upon the questions which the parties themselves have raised at the trial."

The suggestion of the plaintiff's counsel, it may be con-

jectured at present, will be that the charge did not go far enough. If that was so, it was the privilege of the counsel to call the attention of the court to any matter that had been omitted, and to request an instruction upon it. This he did not do, and consequently the rule must be applied, that "a mere omission to charge the jury "on some one of the points in the case, when it does not "appear that the party, feeling himself aggrieved, made "any request of the court on the subject, cannot be assigned "for error."

U. S. Express Co. v *Kountze*, 8 Wallace, 342, 354.

"A party cannot, in a court of error, avail himself of "an omission which he made no effort to have supplied "at the time; * * * nor will a judgment be re-"versed, because the charge is so general in its terms, as "to leave it doubtful whether the jury understood its "application to the evidence. Here, as in the preceding "case, the remedy of the party is to ask for additional "instructions."

Thompson on "Charging the Jury," Sections 81–2.

In the absence of a prayer for specific instructions, the silence of the court was no error.

Per Black, C. J., in *Holliday* v. *Rheem*, 18 Pa. St., 465, 470.

But in reality whatever additional instructions the plaintiff might have sought "must have been unfavorable "to him, and therefore he has no cause to complain."

Per Woodward, J., in *Deal* v. *Bogue*, 20 Pa. St., 228.

It is a case where a new trial could not change the result, and therefore this court would not reverse the judgment even if it found technical error in the charge.

Walbrun v. *Babbitt*, 16 Wall., 77.
Decatur Bk. v. *St. Louis Bk.*, 21 Wal., 294.
Phillips' Practice, 217.
Thutle v. *Thompson*, 15 Wal., 151.

(C.) THE PLAINTIFF HAD NO RIGHT TO REVOKE DEFENDANT'S AUTHORITY TO PAY OVER THESE MONEYS.

Lastly, and in further support of the view *that the giving of further instructions would not have been favorable to the plaintiff, but would the rather have worked injury to him:*

Maintaining, of course, that the contracts were legal in their character (*Roundtree* v. *Smith*, *supra; Lehman* v. *Strassberger*, *supra; Clarke* v. *Foss*, *supra; Gilbert* v. *Gaugar*, 8 Biss., 214; *Jackson* v. *Foote*, 12 Fed. Rep., 37); but, assuming, *pro argumento*, that they were but wagers, yet the plaintiff could not recover these moneys from the defendant after they had been paid over. No authority and no statute allowing such recovery can be found. They were voluntarily paid by the plaintiff to the defendant, to meet the liabilities of the latter as agent for the former, and on general principles the plaintiff cannot recover them back.

Warren v. *Hewitt*, 45 Ga., 501.
Wyman v. *Fiske*, 3 Allen, 208.
Thacker v. *Hardy*, L. R. 4 Q. B., 685; S. C., 18 Am. L. Reg., N. S., 254.
Greenhood on Public Policy, 234–6.

Actually no gambling element existed in the contracts under consideration, in a sense to make them illegal at all.

Greenhood on Public Policy, 236–7.

Defendant Barber, being liable under the rules of the Board of Trade, had a right to pay over the moneys which the plaintiff had put in his hands to meet that very contingency.

Read v. *Anderson*, Law Rep., (Q. B. Div.,) vol. 10, 1882–3; s. c., 48 L. T. R., N. Y., 474; s. c., 16 Cent. L. J., 332.

Rosewarne v. *Billing*, 109 Eng. C. L., 316.

Both in law and good morals the authority of the defendant to pay over these moneys arose when the committee of the Board of Trade made a determination as to how the damages should be adjusted. Such authority was again strengthened when the determination had been sustained by the Supreme court of Illinois (*Wright* v. *Board of Trade*, 15 Chicago Legal News, 239), became irrevocable. The plaintiff's notice of April 2, 1883, should be held to be nugatory.

The defendant made himself personally liable on these contracts. The plaintiff requested him not to deliver the wheat, but to default, as the expression is. The plaintiff afterwards preferred to have a tender made, and next to have a committee of the Board of Trade determine what was the fair market price of the wheat to be delivered, and thereafter caused to be contested the determination of the committee, both as to the price and the tender, raising no question, however, as to the validity of the contracts. In that case, no alternative was left to the defendant but to pay over the moneys which were left with him for his indemnity, to the parties who were entitled to

the damages. He was obliged to pay them over, or be deprived of all privileges of membership in the Board of Trade, with reference to the rules of which, and with full knowledge of the same, the plaintiff had caused the trades to be made. Those rules entered into the contracts, as governing the same.

Denton v. *Jackson*, 106 Ill., 433.
Ward v. *Vosburgh*, 31 Fed. Rep., 12.
Thorne v. *Prentiss*, 83 Illinois, 99.
Nickalls v. *Murray*, L. R., 7 H. L., 539.

As Judge BLODGETT remarked in his charge, the plaintiff appeared to have familiarized himself with those rules. He should not object after they have been applied. "It "was not until after the transaction was fully completed" that he attempted to revoke the authority of Barber to pay over the money which was found to be due in pursuance of those rules equitably construed. The case had been judicially considered at that time by a committee of the Board of Trade, and also by the Supreme court of Illinois, and it was too late for White to rescind the authority of Barber to pay over the money.

Patterson v. *Clark*, 126 Massachusetts, 531.

There is no statute of Illinois which would entitle White to reclaim these moneys from Barber. According to the common law, he could not so reclaim them in the absence of statute, even if the contracts had been gambling contracts.

Yates v. *Foot*, 12 Johnson, 1.
Ruckman v. *Pitcher*, 1 Comst., 402–3, explaining the enactment of a statute in New York.

In Illinois only the "*winner*" of money lost in gaming

is liable to an action for the recovery of it, and defendant Barber was not the "*winner*."

Rev. St. Ill., 1 Starr & Curtis, 792, Ch. 38, § 179.

For an apt illustration of this matter, see *Jackson* v. *Foote*, 12 Fed. Rep., 37.

As himself the chief party in guilt he should not have been allowed to recover.

Story on Agency, Section 235.
Wharton on Agency, Section 250.
Patterson v. *Clark*, *supra*.

His remedy, if any, would be against the men to whom Barber paid the money.

Love v. *Harvey*, 114 Massachusetts, 80.

He has, in suing his agent, attempted to violate various rules of law governing such cases. For example: He received the profits arising from the trades which were made in his behalf, and should not be allowed to repudiate those only which are unprofitable. He should have repudiated all or none.

Story on Agency, section 25.
Wolcott v. *Heath*, 78 Illinois, 433.

But he has not a right to repudiate any of the contracts. They were valid. The law is against him, and he should not further contend with it. The charge was fully as favorable to him as the very able judge who presided could rightfully make it.

Respectfully submitted.

THOMAS DENT,
Atty. for Barber, Deft.